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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

GEORGE E. MORTON, TRUSTEE, AND CITY NATIONAL BANK, A BANKING CORPORATION, AS TRUSTEE, AND INDIVIDUALLY ..... *Petitioners,*

v. No. .....

DARDANELLE SPECIAL SCHOOL DISTRICT NO. 15 OF YELL COUNTY, ARKANSAS ..... *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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July 25, 1941

[illegible] v. S. L. [illegible], Little Rock

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

A. PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, George E. Morton, Trustee, and the City National Bank, Trustee, and individually, respectfully show:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioners were plaintiff and intervener, and the respondent was defendant below. This case originated in the District Court for the Eastern District of Arkansas. It involves two issues of bonds aggregating $160,000 of the

Dardanelle Special School District, of Dardanelle, Arkansas; one issue of $55,000 dated March 1, 1926, and an additional issue of $105,000 dated January 1, 1931. The validity of the bonds is not involved. The District Court in decrees entered in January, 1936, and June, 1938 (R. 50 and 70), declared the respective issues valid and rendered judgment against the District therefor with interest from which there was no appeal. The court retained jurisdiction to grant further relief. Thus, their validity is settled beyond question.

The original bill was filed January 9, 1935, by Morton, as Trustee of the first issue of bonds. At that time the district had paid no bonds or interest for three years (R. 2). The City National Bank, as owner and as Trustee for the owners of the second issue of bonds, filed an intervention on May 29, 1935. Certain taxpayers in the appellee District contested the validity of the second issue, which litigation was protracted for several years. Finally, the court held the bonds were valid and entered a decree giving judgment for the full amount of the bonds and interest on June 28, 1938, from which there was no appeal (R. 70). In this last decree, the court retained jurisdiction to grant further relief.

In the original bill, it was alleged and never denied that the District had pledged all income and revenues from all sources to pay said bonds and interest as they should mature. At the time the bonds were issued, there was no law in the State requiring that bonds issued by a Special School District should have the approval of the voters of the District, or that they should vote a special tax to pay bonds. The affairs of such districts were in the hands of a Board of Directors to manage just as the directors of any other business corporation would. Under the laws in

force when the bonds were issued, the taxpayers of the District voted whatever millage tax they saw fit, not to exceed a certain limit. The expenditure of such taxes so voted was in the hands of the directors. In 1931, *after* these bonds were issued, the Legislature passed Act No. 169 of 1931. Sections 65 and 66 of said Act contained provisions that at school elections, the directors might submit the question of the creation of a building fund to the electors of the District. The ballot was to contain provisions for voting for or against a building fund or for voting a certain number of mills for a building fund with the provision that any such tax voted for one purpose, should not be used for another purpose. There was no such law in existence at the time these bonds were issued.

For many years, the electors of the respondent District voted the limit of eighteen mills school taxes for general school purposes, without allocating any portion of such taxes to any particular purpose. Prior to Act 169 of 1931 there was no power given the electors of a district to allocate any portion of the tax voted to any particular purpose. The original bill contained allegations that the deed of trust executed in connection with the bonds pledged all the revenues and income of the District, from whatever source derived, to the payment of said bonds; that the District had covenanted and agreed to create a building fund and place therein calculated sums each year ample to retire said bonds and interest as they should mature. The District ceased payment of said obligations three years prior to the institution of this suit. The directors claimed that the electors of said District had not voted any mills as a building tax to pay said bonds and that to pay same out of funds voted for a General Tax, would be a diversion of said

funds. The plaintiff alleged in his bill (R. 4) that this was a device being used by the District to defeat payment of its just obligations and if permitted would result in complete repudiation contrary to Section 10, Art. 1 of the Constitution of the United States, and prayed for injunctive and other relief.

At the time the bill was filed, the late Hon. John E. Martineau was presiding as District Judge for the Eastern District of Arkansas. He ordered one-half of the tax revenues of the District be set aside for payment upon its bonds and also provided in the order that the District should be given an opportunity to refund its outstanding debts. He died before the litigation involving the validity of the second issue of bonds was disposed of. After this question was disposed of by his successor, an opportunity was again extended the District to refund its outstanding bonds. No bonds having been paid for nine years petitioners sought additional relief to prevent the District from diverting its revenues, which had been pledged to pay said bonds. The court denied this relief. The court amended the previous order by giving the District all of the 18 mills, holding the petitioners were not entitled to any of it, but did allow out of other taxes an equivalent of six mills to be paid towards its bonded debt. Nine mills would never have liquidated the debt, and the reduction to six mills does not produce a sufficient sum annually to keep the interest current or pay anything on bonds as they mature. The court made findings of fact and announced conclusions of law requested by respondents (R. 163), sustaining its contentions specified in its counter claims as follows:

"For its counterclaim defendant states that on June 28, 1938, an order was entered by this court directing the directors of the district to set aside nine mills with which to pay the bondholders interest and principal due them on bonds; that under the law of the State of Arkansas as it has been interpreted by this Court and the Supreme Court of Arkansas, the directors are without legal authority to pledge any certain amount of revenues to the bondholders, nor has any particular amount of millage been voted to the bondholders by the electors of the defendant district; and that defendant district needs the said revenues for the operation and maintenance of its schools" (R. 83).

The appeal to the Circuit Court of Appeals was from the final decree of June 17, 1940 (R. 164).

The case was argued in the Circuit Court of Appeals on December 17, 1940. On June 30, 1941, that court affirmed the judgment of the District Court (R. 177-183). Petitioners in due time applied to the Circuit Court of Appeals for a stay of the issuance of the mandate (R. 183).

The petitioners seek a review of said cause in this Court upon the ground that the Acts of 1931 and 1933 as construed by the court impair the obligations of the bond contract in violation of their rights under Section 10 of Article I of the Constitution of the United States, and also upon the ground that the taking of the entire millage tax for the maintenance of the schools deprives them of their rights and property in violation of said rights under Section 1 of the 14th Amendment to the Constitution of the United States.

II

STATEMENT OF JURISDICTION

Petitioner, George E. Morton, the original plaintiff, is a citizen and resident of the State of Illinois (R. 1; 72). Respondent is a corporation organized under the laws of the State of Arkansas and domiciled at Dardanelle, Yell County, Arkansas, (R. 1; 72) which is in the Western Division of the Eastern District of Arkansas. The amount involved is more than $3,000, exclusive of interest and costs (R. 1; 73). This suit was filed in the United States District Court for the Western Division of the Eastern District of Arkansas.

Jurisdiction of the Federal District Court was invoked as involving Federal questions: First, that the action of the directors of the respondent in refusing to pay said bond maturities and interest coupons because the electors of the district had not voted a "Building Tax" would be a diversion of funds voted for a "General Tax" contrary to Amendment No. 11 to the Constitution of the State of Arkansas, petitioner contending that if such construction, if allowed, would result in total repudiation in violation of Section 10, Article I, of the Constitution of the United States (R. 4: 29; 84). Second, if the court should refuse to compel the payment of bonds and interest as prayed, such refusal would be a denial of rights under Section 1 of the 14th Amendment to the Constitution of the United States (R. 84).

The statutory provisions believed to sustain the jurisdiction of this court is Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 USCA, Sec. 347a.)

The date of the judgment of the Circuit Court of Appeals to be reviewed is June 30, 1941. A stay of mandate was ordered by the Circuit Court of Appeals on July 14, 1941 (R. 183-4). The record, petition for writ of certiorari and briefs are being filed before the expiration of the period allowed by the stay of mandate.

III

QUESTIONS PRESENTED

1. The bonds being issued under Act 248 of 1905, as amended by Act 25 of 1913 and Act 160 of 1917, the principal question is whether the later acts of the Legislature, including Act 169 of 1931 and the Acts of 1932 and 1933 of the Extraordinary Session of the General Assembly of Arkansas as construed by the Supreme Court of Arkansas impair the obligation of the contract between the bondowners and the school district.

2. Whether the school directors at the time of the issuance of these bonds had power and authority to pledge, in addition to the mortgage on the lands and buildings, all revenues and resources of the district for the repayment of the borrowed money.

3. Whether under the laws of Arkansas and the facts in this case, power can be given under the Constitution and laws of Arkansas to the voters of the district to repudiate its debts.

4. Whether, even if directors under the law in existence at the time of the issuance of the bonds were without power to pledge the income and resources for repayment, the agreement to repay embodied in the bond itself is im-

paired by the Acts above referred to in No. I as construed by the Supreme Court.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons relied on for the allowance of the Writ of Certiorari are:

(1) The Circuit Court of Appeals of the Eighth Circuit has decided a question of local law contrary to and in conflict with the local decisions and the law of the State at the time of the issuance of the bonds.

(2) Under the Constitution and laws of the State of Arkansas in existence at the time of the issuance and sale of these bonds, the board of directors of special school districts in Arkansas had full and complete power to pledge the revenues of the district and to provide a building fund, and to make a contract embodied in the bonds pledging the resources as security for the repayment of the borrowed money, the decision of the Circuit Court of Appeals being to the contrary.

(3) The Circuit Court of Appeals has decided a question of general law in a way untenable to and in conflict with the great weight of authority.

(4) The Circuit Court of Appeals has decided a question of general law on the subject of the power of the directors of school districts in Arkansas to secure the repayment of borrowed money in conflict with the decisions of this Court.

(5) The Circuit Court of Appeals has decided a question of federal law which has not, but should be, settled by this Court.

(6) The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court. (Rule 38, Section 5 (b).)

(7) The question decided by the Circuit Court of Appeals is one of wide public interest, and especially so in this: The said decision of said Court of Appeals of the Eighth Circuit actually and in effect absolutely destroys the credit of every special school district in the State of Arkansas that has issued bonds under the law existing prior to the statutes of March 25, 1931 (Act 169 of 1931) and Act 28 of the Extraordinary Session of the General Assembly of Arkansas of September 2, 1933, and is of further public interest for the reason that said decision makes it impossible for any school district, if it loses its school buildings and lands, to acquire any other school buildings and lands, and thereby makes it impossible for said school district to have schools as there can be no schools without buildings. (Rule 38, Section 5.)

The cases relied on are hereafter referred to in our brief.

V

PRAYER

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record

and proceedings of said court in the case of George E. Morton, Trustee, *et al.*, appellants, vs. Dardanelle Special School District No. 15 of Yell County, Arkansas, *et al.*, appellees, which is case No. 11,793 on its civil docket, to the end that this cause may be reviewed and determined by this court as provided by the statutes of the United States, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed, and that such further relief may be awarded as to this court may seem proper; and that said Act 169 of 1931 and Act 28 of 1933, as construed by the Supreme Court of Arkansas, impair the obligation of the contract between the bondowners and the school district, and that this cause be remanded with directions to the lower court to grant the relief to petitioners for which they pray, and that the defendants, including the directors and the district, and the successors in office of the directors, be enjoined from paying out any of the proceeds of the eighteen-mill tax until the payment of the bonds has been satisfactorily arranged for.

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B.

BRIEF IN SUPPORT OF PETITION

I

THE DISTRICT COURT ERRED IN DENYING RELIEF, BECAUSE ALL INCOME AND REVENUES OF THE DISTRICT HAD BEEN IRREVOCABLY PLEDGED FOR PAYMENT OF ITS BONDS (R. 17-18).

AUTHORITIES

American Exchange Trust Co. v. *Truman Spec. School Dist.*, 183 Ark. 1041, 40 S. W. (2d) 770;

A. H. Andrews Co. v. *Delight Spec. School Dist.*, 95 Ark. 26, 128 S. W. 361;

Casey v. *Smith*, 185 Ark. 149, 48 S. W. (2d) 3;

Chicago Title & Trust Co. v. *Hagler Spec. School Dist.*, 178 Ark. 443, 12 S. W. (2d) 881;

Davis v. *White*, 171 Ark. 385, 284 S. W. 764;

Dissenting Opinion: *Pledger* v. *Cutrell*, 189 Ark. 562, 75 S. W. (2d) 76;

Pertuis v. *Williams*, 137 Ark. 425, 208 S. W. 789;

Schmutz v. *Special School Dist. of the City of Little Rock*, 78 Ark. 118, 95 S. W. 438;

School Dist. of Hartford v. *West Hartford School Dist.*, 102 Ark. 261, 143 S. W. 895;

Special School Dist. of Malvern v. *Speer*, (C.C.A. 8) 75 Fed. (2d) 420;

United States v. *Babbitt*, 66 U. S. 55, 17 L. E. 94;

United States v. *City of New Orleans*, 98 U. S. 381, 25 L. E. 225;

Zartman, Trustee, v. *State ex rel., Champ, et al.*, 109 Ind. 360, 10 N. E. 94;

Act 248 of 1905 as amended by Act 160 of 1917 (Secs. 8977, 8978 and 9010, Crawford & Moses' Digest of Statutes of Arkansas, 1921);

Act 25 of 1913 (Acts 1913, p. 115) amending Act 248 of 1905;

Act 180 of 1917 (Sec. 8984, Crawford & Moses' Digest, 1921);

Act 63 of 1927 (Acts of Arkansas, 1927, p. 177);

II

FEDERAL COURTS FOLLOW LAWS AND DECISIONS EXISTING AT THE TIME OF THE ISSUANCE OF BONDS INSTEAD OF LATER ONES WHERE APPLICATION OF THE LATTER WOULD IMPAIR THE OBLIGATION OF THE CONTRACT WHERE THE QUESTION OF THE CONSTITUTIONALITY THEREOF HAS BEEN APTLY RAISED.

AUTHORITIES

Anderson v. *Santa Anna*, 116 U. S. 356, 6 S. Ct. 413, 29 L. E. 633;

Board of Liquidation v. *McComb*, 92 U. S. (2 Otto) 531, 23 L. E. 623;

Carroll County v. *Smith*, 111 U. S. 556, 4 S. Ct. 539, 28 L. E. 517;

City of Shidler v. *Speer & Sons Co.*, (C.C.A. 10) 62 Fed. (2d) 544;

County of Ralls v. *Douglass*, 105 U. S. 728, 26 L. Ed. 1220;

Davis v. *Weschsler*, 263 U. S. 22, 68 L. E. 143;

Douglass v. *County of Pike*, 101 U. S. 677, 25 L. Ed. 968;

Greene County v. *Conness*, 109 U. S. 104, 3 S. Ct. 69, 27 L. E. 872;

Loeb v. *Trustees of Columbia Twp.*, 179 U. S. 472, 21 S. Ct. 174, 45 L. E. 280;

Los Angeles v. *Los Angeles City Water Co.*, 177 U. S. 558, 20 S. Ct. 736, 44 L. E. 886;

Louisiana v. *Pilsbury*, 105 U. S. 278, 26 L. E. 1090;

Moore, et al., v. *Gas Securities Co.*, (C.C.A. 8) 278 Fed. 111;

Moore v. *Otis, et al.*, (C.C.A. 8) 275 F. 747;

Scotland County v. *United States*, 140 U. S. 41; 35 L. E. 351;

Wolff v. *New Orleans*, 103 U. S. 358, 26 L. E. 395;

U. S. Revised Statutes, Sec. 721.

III

THE COURT ERRED IN REFUSING TO HOLD THAT SECTIONS 65 AND 66 OF ACT 169 OF 1931 AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS VOID AS APPLIED TO THIS ACTION AND CONTRARY TO SECTION 10, ARTICLE I AND SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Authorities

Bronson v. *Kinzie*, 42 U. S. 311, 11 L. E. 143;

City of Winterhaven v. *Gillespie*, 84 Fed. (2d) 285;

Hubbel v. *Leonard*, 6 F. Supp. 145 (Ark.), (3 Judge Court);

Louisiana v. *New Orleans*, 102 U. S. 203, 26 L. E. 132;

Mobile v. *Watson*, 116 U. S. 289, 6 S. Ct. 398, 29 L. E. 620;

Mt. Pleasant v. *Beckwith*, 100 U. S. 514, 25 L. E. 699;

Shapleigh v. *San Angelo*, 167 U. S. 648, 17 S. Ct. 957, 42 L. E. 310;

Von Hoffman v. *Quincy,* 4 Wall. 535, 18 L. E. 403;

Wood v. *Lovett,* U. S., decided May 26, 1941, 85 L. E. 917;

W. B. Worthen Co. ex rel. v. *Kavanaugh,* 55 S. Ct. 555, 295 U. S. 56, (Ark.), 79 L. E. 1298;

W. B. Worthen Co. v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816, (Ark.), 78 L. E. 1344.

C

ARGUMENT

Lest the court should get the impression the petitioners are seeking to press too heavily on the respondent district, we desire to point out that the record shows that respondent is now in default in the payment of bonds exceeding $72,000 and about $35,000 in interest. The bonds are in default for more than eight years (R. 73-4-5). The District Court found as a fact (R. 162) that the amount now received annually by petitioners under its modified order is insufficient to keep even the interest current. Ample provisions exist under the Statutes of Arkansas for refunding school bonds. (See Sec. 1 of Act 248 of 1905, also, 72, etc., of Act 169 of 1931; Secs. 11505, etc., Pope's Digest of Statutes of Arkansas.) The petitioners waited for three years after the district began defaulting before taking any action. The record shows that ample opportunity was given respondent by the District Court in its preliminary orders (R. 22, Jan., 1935; R. 47, July, 1935; R. 79, June, 1938) to refund. It is further shown (R. 116 and 130) that petitioners themselves extended respondent an opportunity to refund its bonds for 20 years. These offers were rejected (R. 139-40). We appreciate the fact that these opportunities and offers are not material to the constitutional questions now to be presented, but it does show petitioners were lenient and tried to co-operate in a solution of respondent's financial difficulties. It was not until all other avenues were closed that they sought additional relief. As we said before, after a lapse of eight years.

The final decision of the District Court affirmed by the Circuit Court of Appeals is in direct conflict with an earlier

decision in the same court—a case involving the identical question which was affirmed by the Circuit Court of Appeals. See *Spec. School Dist. of Malvern* v. *Speer,* (C.C.A. 8) 75 Fed. (2d) 420. The District Court's decision is also in direct conflict with another case in the same court, a three-judge court convened in the case of *Hubble* v. *Leonard,* 6 Fed. Supp. 145, from which there was no appeal. There Judge Gardner, Circuit Judge rendering the opinion of the Court, said:

> "Accepting the construction of the Arkansas Supreme Court as to the validity of this legislation, we may properly assume that the bonds issued pursuant to these acts constitute valid obligations of the state. These acts of the Legislature authorizing the issuance of the bonds and contracting for their payment, became a part of the state's contract, and in effect these provisions are embodied in the bonds themselves, leaving no doubt of the intention of the parties that the legislation should be read into the contract. *United States ex rel. Von Hoffman* v. *Quincy,* 4 Wall. 535, 18 L. Ed. 403; *Board of Liquidation* v. *McComb,* 92 U. S. (2 Otto) 531, 23 L. Ed. 623; *Louisiana* v. *Pilsbury,* 105 U. S. 278, 26 L. Ed. 1090; *Wolff* v. *New Orleans,* 103 U. S. 358, 26 L. Ed. 395; *Moore* v. *Otis,* (C.C.A. 8), 275 F. 747, 751; *Moore* v. *Gas Securities Co.,* (C.C.A. 8), 278 F. 111."

There was no appeal from this decision. The Governor of Arkansas and the Legislature which he called in Special Session made honorable provision for the liquidation of its 84 millions of highway bonds.

During the depression there were two other cases originating in Arkansas to reach this court involving practically the same question now presented. See:

> *W. B. Worthen Co. ex rel.* v. *Kavanaugh,* 55 S. Ct. 555, 295 U. S. 56, (Ark.), 79 L. E. 1298;

W. B. Worthen Co. v. *Thomas*, 292 U. S. 426, 54 S. Ct. 816, (Ark.), 78 L. E. 1344.

This petition could possibly be brought to a close here and it may be the court will see fit to grant same on the case as now presented, but caution and anxiety move us to give the court the benefit of our search of the laws of the State and decisions of the Supreme Court of the State involved herein, which we will do as briefly as possible.

THE BOARD OF DIRECTORS OF THE RESPONDENT SCHOOL DISTRICT HAD THE POWER AND FULL AUTHORITY TO ENTER INTO THE CONTRACT EMBODIED IN THE BONDS PLEDGING ALL RESOURCES OF THE DISTRICT TO PAY THE BONDS

Prior to 1869 there were no classes under Arkansas law of school districts. The Legislature of Arkansas of 1869, by Act 13, authorized the creation of what are known as special or single school districts. We have set that Act out in the appendix to this brief. That Act is entitled: "An Act for the Better Regulation of Public Schools in Cities and Towns." (See Acts 1869, pages 20-28.) The respondent district was organized under that Act in 1879 (see *Cole, as Sheriff*, v. *Blackwell*, 38 Ark. 271).

The first Act authorizing the issuance of bonds by school districts was Act 50 of 1873, page 109. This Act authorized the issuance of bonds under certain conditions by special school districts, but did not authorize common school districts to issue bonds. For the convenience of the court, we have set out that Act in full in the appendix. Under that Act, a board of directors of a special school district is given power to issue bonds, but there is a pro-

vision in the Act which prevents the issuance of bonds by the board of directors "unless a majority of the legal voters in such school district shall vote in favor of such issue." Section 3 of said Act embodies the public policy of the State at that time as to the repayment of borrowed money. It is evident from said Act that the State Legislature regarded the obligation to repay the borrowed money as a high obligation. Said Section 3 has this language:

> ". . . and each year thereafter the County Court shall, at the time of levying county taxes, levy a rate on the taxable property of such school district, in addition to the amounts levied for ordinary school purposes, to raise an amount of money sufficient to pay such amounts as may become due and payable on such bonds during the succeeding year, and the tax so levied shall be collected by the collector and paid over to the county treasurer, to the credit of such school district, in United States currency, and the county treasurer shall keep such fund separate from all other funds in his hands, and shall only pay the same on the order of the board of school directors, drawn for the purpose of paying such bonded indebtedness of such school district; and the board of school directors of such school district shall not draw any order on the treasurer, payable out of such fund, for any other purpose, until all of said bonded indebtedness shall have been paid and canceled."

The Constitution of 1874 by specific language continued in force all valid laws in existence at the time of the adoption of the Constitution unless in conflict and until repealed or modified. See schedule to said Constitution. Pope's Digest of the Statutes of Arkansas, page 163.

We refer to said Act 50 and said Constitution for the purpose of showing the policy of the State in its very first act authorizing school districts to borrow money. We

submit that said Act is expressive of the policy of the State and the obligation of school districts to repay borrowed money. We have found nothing in the Constitution of 1874, or in any Act passed since 1873, repealing the above Act 50 of 1873 except as herein stated.

Act 248 of 1905, which we have printed in the appendix, *did* modify said Act 50 of 1873 by omitting the requirement that no bonds should be issued unless the electors by a majority vote approved the same.

The Legislature of Arkansas by Act 85 of 1903 authorized special school districts to borrow money, but required a vote of the electors before the bonds could be issued. Said Act 248 of 1905 gave power to the directors of the district to issue bonds but *did not* require any approval of the electors of the district. It will thus be observed that the Legislature of Arkansas repealed the previous act requiring a vote of the electors. It did not repeal Sec. 3 of Act 50 of 1873 *ante.*

Section 1 of Act 248 of 1905 was amended by Act 25 of 1913, and Section 2 was amended by Act 160 of 1917. The original Act (No. 248) as amended, and Act 180 of 1917, appear in Crawford & Moses' Digest of the Statutes of Arkansas (1921) as Sections 8977, 8978, 8984 and 9010, which were repealed by Act 169 of 1931, subsequent to issuance of these bonds.

Act 25 of 1913, page 115, amends Section 1 of Act 248, and the language of the amendment is as follows:

> "All special free school districts in the State of Arkansas are hereby authorized and empowered for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and mortgage the real property of the district as

security therefor, under such conditions and regulations as to amount, time and manner of payment as the Board of Directors of said School District shall prescribe, and renew and extend from time to time any evidence of indebtedness or mortgage, or both, issued or made by virtue thereof."

The next amendment to Act 248 was made in 1917, and is found in the Acts of 1917 (Vol. I), page 857. That was an act to amend Sections 2 and 4 of Act 248. Section 2 of original Act 248 will be found in the appendix of this brief. Section 4 will also be found in the same place. Said Section 4 in the original act merely fixes the effective date of the act and repeals all laws in conflict therewith. The amendment to Section 2 by the Act of 1917 is as follows:

"The said evidences of indebtedness, whether warrants or promissory notes, or both, and mortgages, shall be in form in all respects as other investments of like kind are required by law to be, and shall have the same force and effect as they would if executed by natural persons, and the warrants shall have the same validity as they would if there were money in the county treasury to pay the same at the time they were drawn and may be drawn payable in the future, and need not be registered with the county treasury until the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date, as the building fund is provided and collected by the successive levy and collection, and said special school district shall be allowed in law or equity no defense merely by reason of the fact that it is a school district. *Provided,* that should any school district desire to borrow money and issue bonds or other evidence of indebtedness. The school directors of said district shall advertise for bids for the sale of bonds and other evidence of indebtedness and publish notice of the intent to borrow money. Said advertisement and notice to be published in county or city papers that have a general circulation, and shall sell all bonds

or other evidence of indebtedness to highest and best bidders, provided, that no bonds shall be sold for less than par, all bids to be published in newspapers of general circulation."

There was no other amendment to Act 248 until *after* these bonds were issued. As before stated, the Legislature by Act 169 of 1931 repealed all of these sections embodying Act 248 and its amendments.

As the bonds were issued by respondent on March 1, 1926, and January 1, 1931, and as Act 248, as amended, *was the only law in force at those times,* it becomes necessary for the court to construe same in order to determine whether the petitioners will be limited to recover for the benefit of the bondholders from the lands and buildings alone, or whether payment shall be made out of the tax revenues. The respondent contends that the only security for the bonds are the buildings and lands, and the state apportionment, while the petitioners contend that the security for the bonds is the full faith, credit and all resources of the district.

Each of the said bonds contains the following language (R. 10):

"This bond is one of a series of fifty-seven (57) bonds aggregating Fifty-five Thousand Dollars ($55,000), etc., issued for the purpose of providing funds with which to erect and equip a necessary school building in and for said school district, and for other purposes."

And also:

"That the Dardanelle School District of Yell County, Arkansas, acknowledges itself to owe and for value received promises to pay to the bearer $_____ together with interest thereon from the 1st day of

March, 1926. * * * The bond and attached interest coupon, as well as the bonds and coupons forming a part of this issue, are payable out of the proceeds of taxes heretofore or hereafter legally levied upon the real property within said Dardanelle School District, *and all income of said School District from any and all sources whatever, and the said bonds and coupons are secured by a mortgage lien and pledge on all of the property, resources and income belonging to said District, including the school buildings of said District and the grounds on which the same are located"* (R. 10-11).

"The Dardanelle School District, Yell County, Arkansas, hereby covenants that said School District is duly and legally existing as a School District, under the Constitution and Laws of the State of Arkansas; *that a building fund tax has been duly voted against the real property within said District,* for the purposes required by law; that all acts, conditions and things required to be done, precedent to and in the issuing of this bond, including the organization of said School District, and the Board of Directors, and all such things have been done by said Board, and said District, and have happened and have been performed in regular and due form as required by law. (Italics ours.)

"For the faithful performance of all the covenants, recitals and stipulations herein granted and contained; for the proper application of the proceeds of said bonds, and for the taxes heretofore or hereafter levied, and all income of said District hereafter received, and for the faithful performance in apt time and manner, of every official act required and necessary to provide for the prompt payment of the principal and interest of this bond, as the same may mature, the full faith, credit and all resources of said school district are hereby irrevocably pledged. * * *" (R. 11).

In paragraph 15, Deed of Trust, appears the following:

"The grantor has created a building fund and has directed that from the first revenues derived from

either the State of Arkansas, County of Yell, the taxes paid by the inhabitants of the district, *or from all of said sources or from any other source,* there shall be set aside and paid into the said building fund the following amounts in the following years: (R. 17)

"In the year 1926, $1,604.17, (and increasing amounts each year to 1951). For the liquidation of said bonds and interest.

"And if in any year the revenues are insufficient to equal the amount of the appropriation to the said building fund in that year, the amount of the deficit shall be set aside and paid into the said building fund in the first year following until said deficit is made good, and that said building fund is hereby appropriated for the payment of the debt secured by this deed of trust, and no portion thereof shall be used for any other purpose until said debt secured by this deed of trust has been paid in full" (R. 18).

In Section 2 of Act 248 of 1905, Acts 1905, page 651, reference is made to evidences of indebtedness, whether warrants, promissory notes or mortgages which shall be in form as other investments of the like kind, and shall have the same force and effect as if executed by natural persons. Then, referring to the time of payment appears these words: "But shall be drawn upon the *building fund* and paid out of it in the order of their date, as the *building fund* is provided and collected by the successive levy and collection, and said school district shall be allowed in law, or equity, no defense merely by reason of the fact that it is a school district."

With the law as above set forth in Act 248 of 1905, and the amendments thereto above outlined in full force and effect, the Supreme Court of Arkansas in the case of *Schmutz* v. *Special School District of Little Rock,* 78 Ark.

118, 95 S. W. 438, held that the school directors of a special school district had full power and authority to mortgage the real estate as security for the bonds, and also to pledge as security for the repayment of the money borrowed, all the revenues of the district. This decision is based upon Act 55 of 1905, page 154. Said Act 55 of 1905 and Act 248, as amended, *are identical* on the matters under discussion. While the Schmutz case was based upon a special act, yet the language of that particular special act giving power to the directors to issue bonds is exactly the same as the language in Act 248, which gives power to the directors to pledge the resources and to mortgage the property. The decision in the Schmutz case was handed down March 3, 1906. From 1906 until after the issuance of these bonds, there was no questioning of the power of the directors of special school districts in Arkansas to pledge the resources of the school district. The court in the Schmutz case on this subject used the following language:

> "Lastly it is contended that the recitals in the bond pledged the revenues of the district for their payment. The act under which the bonds were issued provides that the evidences of indebtedness issued by the district shall be 'paid out of the building fund in the order of their date, as the building fund is provided and collected by successive levies.' This in effect pledges the building fund of the district, whatever that may be, to the payment of the bonds. Besides, as the bonds are valid obligations, it was evidently the intention of the Legislature that they should be paid out of the revenues of the district, and they are therefore a charge against such revenues as any other valid debt would be."

During the period from 1906 to 1931, there were issued by Arkansas special school districts, bonds in sums exceeding twenty-three millions of dollars. (See State Comptrol-

ler's Biennial Report, Arkansas, Dec., 1932, of Bonded Debt of Schools, pp. 88-89.) Courts take judicial notice of such official reports. During that period every special school district in the State pledged the resources and income, as well as mortgaging the real property. There was nothing else to pledge, for payment has to be made out of income derived from taxes collected by the districts. Until the decision of *Horne* v. *Paragould Special School District,* 186 Ark. 1000, 57 S. W. (2d) 568, there was no question or doubt of the power of the directors of special school districts to issue bonds and to pledge the resources and income of the district. The amendments to Sections 2 and 4, above referred to, mention and describe the building fund. The language of Article XIV of the Constitution of 1874, and the language of Acts 248 and 55 above referred to, and the amendments to Act 248, are conclusive that the Legislature did give such specific power to the board of directors. If that power existed, the contracts embodied in the issuing of these bonds are valid and are entitled to the protection of Section 10 of Article I of the Constitution of the United States. (See *Gelpe* v. *Dubuque,* 1 Wall., 68 U. S. 175, L. E. 520.)

It is general law everywhere that when a school district or municipality mortgages real estate, the mortgagee is not compelled to rely upon the land mortgaged, but may enforce his rights against the revenues of the district. The language in the amendments to Act 248 in describing the fund for repayment shows that said fund is one resulting from the proceeds of taxes which have been levied and collected. There is no escape from the view that the building fund is a fund which results from the levy and collection of taxes. This contention is supported by the language

of Mr. Judson in his work on Taxation, at Section 545, as follows:

> "The fact that specific property is pledged for the payment of the bonds does not make them any the less the general obligations of the municipality, nor deprive the plaintiff of the right to a mandamus compelling the levy of a tax for their payment, since the pledge is only by way of collateral security."

It is our view that the principles governing the rights of these parties on this question have been approved by the decisions of this court. In the case of *County of Mercer* v. *Hackett*, 68 U. S. 83, 17 L. E. 548, 86 A. L. R. 1074, the court said:

> "Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds, we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad 'speculators' are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation, after they have been negotiated and have come into the possession of *bona fide* holders."

A state court cannot so construe the acts of the Legislature as to impair the obligation of a contract. When a valid contract is made, as there was made in the issuance of these bonds, every elector and taxpayer in the district is bound by that contract. The State has no power under the Constitution of the United States to give authority or power to the taxpaying voters to impair the obligation of a contract. In *Shapleigh* v. *San Angelo*, 167 U. S. 648, quoting paragraph 2 of the syllabus, this court said:

> "A statute making a vote of taxpaying voters necessary to the assumption by a new municipality of a debt of its predecessor, which has been abolished, is an unconstitutional attempt to impair the obligation of the contract, if a liability existed without such vote before the statute."

It is not denied that a liability to pay this debt existed; the lower court gave judgment for the full amount of the bonds and interest. Reference is also made to the case of *Provident Life* v. *County of Mercer,* 170 U. S. 593, 43 L. E. 1156, again this court said:

> "While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisites of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to this case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the county judge, the bonds were issued, more than $100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity."

The specific right of a bond creditor to protect a fund pledged for the payment of the bonds by a restraining order or a mandatory injunction has been upheld, without dissension we believe, by the textwriters and the courts. 32 Corpus Juris 270, has this to say:

> "Under some circumstances, however, the holders of bonds, for the payment of which certain funds were

to be set aside, may be entitled to an injunction against the misapplication of such funds on the ground that he is entitled to the specific enforcement of the agreement with him."

Again adverting to the construction of the act in question, we believe *had* the Legislature intended the revenues of the district should be used solely for current operating expenses, or if it *had* intended to prohibit their use for retiring bonds, *it would have written such limitation in the act;* then there would have been no market for the bonds. The omission of any such provision evinces an intention that the directors were to be given discretion in managing the financial affairs the same as directors of any other corporation. The directors were given the power and the electors were not.

To substantiate this line of argument, we quote from the case of *United States* v. *City of New Orleans,* 98 U. S. 381, 25 L. E. 225:

"* * * A municipality without the power of taxation would be a body without life, incapable of acting and serving no useful purpose.

"For the same reason, when authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. 'It is, therefore, to be inferred,' as observed by this court in *Loan Asso.* v. *Topeka,* 20 Wall. 660 (87 U. S. XXII 460), 'that when the Legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to

levy such taxes as are necessary to pay the debt, unless there is in the Act itself or in some general statute, a limitation upon the power of taxation which repels such an inference.'

"* * * Thus, in *Lowell* v. *Boston,* 111 Mass. 460, the Supreme Court of Massachusetts, in speaking of bonds which the Legislature had authorized the City of Boston to issue, in order to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city which was burned in the great fire of November, 1872, said: 'The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of the necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized.' To the same purport is the language of the Supreme Court of Wisconsin, in *Hasbrouck* v. *Milwaukee,* 25 Wis. 122. And in the recent case of *Ex parte Parsons,* in the United States Circuit Court, the Chief Justice gave emphatic affirmation to the doctrine. 1 Hughes 282. Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the Legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it."

This court in the recent case of *Wood* v. *Lovett,* decided May 26, 1941, ... U. S. ....., 85 L. E. 917, discussed the question of clarification of contracts. This court in that case said:

"By its legislation the State said, in effect, to the prospective purchaser of lands acquired for delinquent taxes, that if he would purchase he should have the immunity. Under the settled rule of decision in this court the execution of the State's deeds to the appellants constituted the execution or consummation of a contract, the rights arising from which are protected from impairment by Article 1, Section 10, of the Constitution; and the obligation of the State arising out of such a grant is as much protected by Article 1, Section 10, as that of an agreement by an individual. *Fletcher* v. *Peck*, 6 Cranch (U. S. 87, 136, 137, 139, 3 L. Ed. 162, 177-179). The Act of 1935, taken in connection with the other statutes regulating the acquirement by the State, and the disposition by it, of lands sold for delinquent taxes, constituted in effect an offer by the State to those who might become purchasers of such lands, and the protection it afforded to the title acquired by such purchasers necessarily inured to every purchaser acting under it and constituted a contract with him.

"The federal and state courts have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract."

There has never been before this court a question of higher or greater importance than that involved in this case. If it be true, as the later decisions of the Supreme Court of Arkansas now hold, that the electors by merely voting eighteen mills without specifying the purpose thereby vote against the use of any part of the proceeds of such taxes for the purpose of paying building debts, then no building debts could ever be paid. The tobacco tax and other similar taxes mentioned in the decree are wholly insufficient. In this particular case they amount to about six

mills. There is no more reason for taking the six mills from such taxes than there is for taking the eighteen mill tax.

The decisions of this court above referred to, and numerous other decisions unnecessary to cite, establish the principle that when a state grants to a school district or other municipality the power to issue bonds, it follows, in the absence of any constitutional or statutory prohibition, that there is an implied power in the directors or other authorized officials to make provision for the repayment of the borrowed money.

If the directors in the special school districts of Arkansas failed to pledge the income and resources, there would be no sale of any such school bonds.

In this case the lower court, and on appeal the Court of Appeals, in effect declared that the only security held by the bondowners was the mortgage of real estate. It is known to all, investors as well as borrowers, that when funds are invested in lands and buildings for school purposes, such property does not have a value equity to the amount of money spent in the construction and equipping of the same. Everyone knows that the school district has only one means of acquiring funds to pay its debts, and that is taxation in one form or another. The eighteen mills in Arkansas is the chief source of obtaining funds to pay debts and to pay for the maintenance or operation of the schools. These bondowners, represented by the petitioners here, loaned in cash to the respondent district $160,000. It is alleged in the complaints of plaintiff and intervener that the property, consisting of the lands and the buildings thereon, is of little value other than for the purpose of operating schools. There is no denial of that in

this case. If the opinion of the Court of Appeals of the Eighth Circuit and the order of the District Court be not reversed, then the only security held by the bondowners is the mortgage. If the mortgage is foreclosed and the real property sold, the school children of this large and prosperous district will be deprived of schools. This will result because of these reasons: The property when offered for sale will not bring probably more than a fifth, and maybe not more than a tenth, of the $160,000 borrowed. That will leave a judgment over in favor of the bondowners against the district. That judgment, under the laws of Arkansas, is a lien upon all real property owned or acquired by the judgment debtor. The school district cannot borrow other money to build other buildings. It would have no real estate to offer as security. If it cannot pledge the resources, then it is without remedy. No bondowner would buy bonds that were without the pledge of the resources because of these facts. With a judgment against the district after the lands are sold, should the district purchase other property, said judgment would become a lien thereon. Hence the district could give no mortgage. The judgment against the district over and above the proceeds of the sale would remain a lien indefinitely.

It therefore appears to us that if the decision of the Court of Appeals of the Eighth Circuit stands, it would follow that the special school districts of Arkansas are doomed. The district cannot build other buildings because it is without means. It cannot borrow because it has no security to offer.

In the opinion of the Court of Appeals of the Eighth Circuit, which is printed in the record at pages 177-183, it is clear from what the court says therein that said court

regarded itself bound by the decision of the Circuit Court of Appeals in *Women's Catholic Order of Forresters* v. *Special School Dist. of North Little Rock,* 105 Fed. (2d) 716. With all respect to said court, we earnestly urge that the case referred to is not in point and is not binding either upon the Court of Appeals or upon this court. The primary object of the bringing of that suit was to secure for the owners of $25,000 of bonds of said school district a preference in payment from the revenues of the district, and to enjoin the officers from paying other bondowners in preference to the payment of the interest on the bonds of the appellant. In that case the Court of Appeals expressly stated that there was no question of the impairment of a contract. The Court of Appeals in that case used this language:

> "The instant case involves a construction of the statutes of Arkansas as applied to Arkansas contracts. The jurisdiction of the federal court was invoked on the ground of diversity of citizenship, and there was no allegation or claim that either of the legislative acts involved nor the Constitution of Arkansas impaired the obligation of the contract, in violation of the restraints of the Federal Constitution." (Pg. 721, Point 1.)

That language is an emphatic declaration that the questions involved in the instant case were not involved in that case. The court in that case cited the Schmutz case and other cases decided under the old law, not for the purpose of ascertaining whether there was an impairment of the contract, but for the purpose of ascertaining whether the appellant's bonds, being prior in time, had priority over the bonds of the other bondholders. The question as to whether Act 248 of 1905 and the amendments thereto,

including the one of 1917, specifically authorized the board of directors to create a repayment fund to retire bonds issued for building purposes, was not involved. Besides, it is clear that said case upon which the Court of Appeals relied is in conflict with the decisions of this court on the exact question involved, the impairment of the obligation of contracts and the power and authority of municipalities and school districts to provide for repayment of money borrowed. This court in the case of *County of Mercer* v. *Hackett*, 68 U. S. 83, and in the cases known as the New Orleans cases cited and commented on heretofore all hold that when authority is given to a board of directors to issue bonds, there exists an implied power in the said board to provide a repayment fund, even though the statute giving the authority to issue bonds in no manner expressly authorizes the repayment, and even though the statute does not expressly say that repayment may be provided for by the same authority that is to issue the bonds.

ACT 169 OF 1931 AND ACT 28 OF THE EXTRAORDINARY SESSION OF 1933, AS CONSTRUED BY THE DECISIONS OF THE SUPREME COURT OF ARKANSAS, NOT ONLY IMPAIR THE OBLIGATION OF THE CONTRACT IMPOSED IN THE BONDS AND THE PROCEEDINGS, BUT ABSOLUTELY DESTROY ALL CREDIT OF THE SPECIAL SCHOOL DISTRICTS OF THE STATE

The first case construing the above act was the case of *Horne* v. *Paragould Special School District*, 186 Ark. 1000, 57 S. W. (2d) 568. That decision was rendered in 1933 after these bonds were issued. The Court of Appeals in its opinion takes the position that the decisions of the

Supreme Court of Arkansas in the Horne case, the Pledger case, and the other cases that followed these two, are nothing but a clarification of the earlier decisions of the Supreme Court of Arkansas. We earnestly submit that that view is erroneous. It is difficult to understand how there could be merely a clarification when the latter cases are based upon a statute passed after the issuance of these bonds.

The Court of Appeals in its opinion takes the view that the decision in the Horne case was merely a reversal of a former ruling of the Supreme Court of Arkansas and hence there was no impairment of contract. This view is clearly erroneous for the reason that the Arkansas court in the Horne case was influenced by Act 169 of 1931. Besides the tax voted in the Horne case was voted under Act 169, the vote being in 1931. In addition the Pledger case which followed the Horne case is clearly based upon the statute of 1931 and also in part upon Act 28 of 1933.

No bondowner was a party to the Horne case. Apparently that was a suit sometimes called a "friendly suit." The county treasurer was a citizen and resident of Greene County as were also the school directors. Horne was not authorized by any bondowner to defend for the bondowners. It could easily be true that both plaintiff and defendant desired the same result. There was no claim made in the suit of any impairment of the contract in the bonds.

We have demonstrated in other parts of this brief that the Supreme Court of Arkansas plainly held in the Schmutz case that the board of directors *had* power to pledge the revenues. The same is true of the Trumann case. But the invariable rule in this court is that a munici-

pality authorized to issue bonds has power to provide a fund for repayment. See the case of *United States* v. *City of New Orleans*, 98 U. S. 381, 25 L. E. 225.

The innate weakness of the Horne case is that the Arkansas court without reversing the Schmutz case attempted to tell its meaning and thereby attempted to give color to the theory that the Horne case was a clarification of the Schmutz case. No state court has the power in a case involving the impairment of a contract to say what is the meaning of a prior case holding the directors *had power.*

As a matter of absolute law this court in determining whether a state court has held that the board of directors had the power is the sole judge of what the court held in the Schmutz case. We have cited cases to that effect in other parts of this brief.

The learned Arkansas court overlooks amendment No. 11. Said court in effect, without a word in the Constitution, gives the electors power to destroy the bond contract.

In effect the Arkansas court holds in these cases that the entire millage fund may be used in the maintenance of schools leaving the bondholder in this case without any of the millage fund to pay his debt. That ruling violates amendment No. 11 because said amendment requires the millage taxes to be used in payment of building debts and the construction of buildings.

CONCLUSION

The decision of the Arkansas court in the Horne case is misleading and harmful, and suggests to the electors a means of utter repudiation and therefore impairs the obligation of the bond contracts. In addition, the decision in the Horne case is based upon the assumption that the electors are not honest enough to vote taxes sufficient to pay an honest debt of the school district. We cannot assent to that assumption. We believe that where investors have spent $160,000 to build schools, without which there would be no schools, and where the schools may be operated by donations and loans from the State without using any of the eighteen mills, the electors are honest enough and right-minded enough to vote the eighteen mills to repay borrowed money. By this suggestion we do not concede that the electors after receiving and using the borrowed money and the buildings can defeat repayment.

It is plain that the Horne case opened the highway to repudiation and impairment of the bond contract to repay as well as to pledge the revenues. The Pledger case broadened the highway to repudiation, but that case was weakened by the dissenting opinion of Mr. Justice Frank Smith of the Supreme Court of Arkansas. The Court of Appeals in the Women's Catholic Order of Foresters case followed the illogical reasoning and obiter statements in the Horne case. Then again the Court of Appeals in the instant case committed the further error in following its decision in the Women's Catholic Order of Foresters case, although the latter case is in no manner controlling and does not decide the questions involved in the instant case.

We most respectfully submit that on the record, under the prior decisions of the Supreme Court of the State and the statutory laws as they existed at the time these bonds were issued, the court erred in denying the relief prayed for and that the petition should be granted.

Respectfully submitted,

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July 25, 1941

APPENDIX

ACT 13

AN ACT FOR THE BETTER REGULATION OF PUBLIC SCHOOLS IN CITIES AND TOWNS

Acts 1869, Pages 20-28

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That any incorporated city or town in this State, including the territory annexed thereto for school purposes, may be organized into and established as a single school district in the manner and with the powers hereinafter specified.

SECTION 2. *Be it further enacted,* That, upon the written petition of twenty voters of such city or town, praying that the sense of the legal voters of said city or town may be taken on the adoption of this act, for the regulation and government of the public schools therein, it shall be the duty of the mayor of such city or town, within five days after the presentation of such petition, to designate and fix a day not less than seven nor more than fifteen days distant, for holding an election in said city or town for that purpose, and also for the election by ballot at the same time of a board of six school directors for said city or town. The mayor shall cause notice of said election to be given by posting notices in at least five public places in said city or town, and by one insertion in such newspapers as may be published in said city or town. The electors at said election desiring to vote in favor of the adoption of this act, shall have written or printed on their ballots "For the School Law," and those opposed thereto, shall have written or printed on their ballots "Against the School Law," and, if a majority of the ballots cast at said election shall be "For School Law," then, and in that case only, shall such city or town be deemed and held to be a single school district under and in pursuance of this act, and the directors voted for and elected at said election shall qualify and enter upon the discharge of their duties as hereinafter provided. Said election shall be held at the same places and conducted in the

same manner as elections for municipal officers of said city or town, and the returns of said election shall be made to the mayor and aldermen of said city or town, who shall declare the result of said election; and, if this act is adopted, they shall cause notice to be given to the persons elected directors, and immediately after receiving notice of their election and taking the oath of office required of school trustees, (which oath shall be filed with the clerk or recorder of said city or town), said directors shall meet, and, by lot, determine the length of time of their respective terms of office. Two shall serve until the third Saturday in December next after their election, two for one year thereafter, two for two years thereafter, and on the third Saturday in December next after the first election, and annually on that day thereafter, there shall be chosen, in the same manner, two directors, who shall serve for three years and until their successors are elected and qualified. Said board shall fill any vacancy that may occur therein until the next annual election for directors, when such vacancy shall be filled by election.

SECTION 3. *Be it further enacted,* That said board of directors shall organize by choosing from their own number a president and secretary, who shall hold their offices until the last Saturday in December, and annually on that day said board shall meet and elect from their number a president and secretary.

SECTION 4. *Be it further enacted,* That said board of directors shall hold a regular meeting on the last Saturday in each month, and may hold stated meetings at such other times and places in said district as they may appoint; that four members of said board shall constitute a quorum, but a less number may adjourn from time to time; that special meetings thereof may be called by the president, or by any two members of the board, on giving one day's notice of the time and place of the same, and in case of the absence of the president at any meeting of the board, a president *pro tempore* shall be chosen. The office of any member of said board, as such, who shall, without good cause, fail to attend three consecutive monthly or stated meetings of said board, may be declared vacant by the board. The board

may make rules and regulations for their own government, and for the dispatch and regulation of the school business and affairs of the district, not inconsistent with law.

SECTION 5. *Be it further enacted,* That said board of directors shall have power to purchase or lease school-house sites; to build, hire or purchase school houses, and to keep in repair and furnish the same with the necessary seats, desks, furniture, fixtures and fuel, and to insure the same; to fence the school grounds, erect out-houses, provide wells, and make all other improvements on the schoolhouse grounds, and school-houses belonging to the said district, necessary and proper for the comfort, convenience and health of scholars, and the preservation of said property; to hire teachers for all public schools of the district; employ a superintendent of the schools, who may also be principal of any graded or high school that said board may establish; to provide books and apparatus for the schools, and the necessary blank books and stationery for the board and school registers, and the blanks for the teachers; to establish and maintain a sufficient number of primary, graded or high schools, to accommodate all the scholars in said district; to determine the branches to be taught, the textbooks to be used in the several schools of the district not to be in conflict with the recommendations of the State Board of Education in that respect; to admit pupils not belonging to the district on such terms as they may agree upon with the parents or guardians of said pupils, or the district from whence they came; to appoint a board of three visitors and examiners for the schools of the district; which board shall examine persons applying to teach in any of the schools in said district; *Provided,* No teacher shall be employed who does not hold a certificate from the State or circuit superintendent, to examine, from time to time, the books and the accounts of the county treasurer, so far as the same relate to the several school funds belonging to the district; to levy a tax on their district to raise a fund or funds to carry into force and effect the powers herein granted; and when, in the opinion of a majority of the members of said board, the best interests of the district demands a sale or exchange of any real estate or school-house site belonging to the district, they

may sell or exchange the same, the deed therefor to be executed by the president of the board, upon a majority vote of the whole board of directors, authorizing and directing such sale or exchange.

SECTION 6. *Be it further enacted,* That it shall be the duty of said board, as soon as the means of that purpose can be provided, to establish in said district an adequate number of primary schools, so located as best to accommodate the inhabitants thereof; and it shall be the further duty of said board to establish in said district a suitable number of other schools of a higher grade or grades, wherein instruction shall be given in such studies as may not be provided for in the primary schools; the number of schools, the grades thereof, and the branches to be taught in each and all of said schools, to be determined by said board. It shall be the duty of said board to keep said schools in operation not less than three nor more than ten months in each year. The said board shall have power to make and enforce all necessary rules and regulations for the government of teachers and pupils in said schools. Said board shall also separately or collectively, together with such persons as they may appoint or invite, visit the schools in the district at least twice in each year, and observe the discipline, mode of teaching, progress of the pupils, and see that the teachers keep a correct register of the pupils, embracing the periods of time during which they attend school, the branches taught, and such other matters as may be required by law or the instructions of the circuit or State superintendents.

SECTION 7. *Be it further enacted,* That said board shall annually, and in time for the county court to levy the tax and enter it on the tax-books for the year for which the estimate was made, determine the amount of money that will be required in said district for the support of schools for the current year, and for the purchase of school-house sites and erection of school-houses, and for all other school purposes during that year; and in making said estimate, said board shall put down the amount estimated to pay teachers, separate from the estimate for all other purposes, and the amount so estimated to pay teachers shall be called the

"Teachers' Fund," and the amount estimated for all other purposes shall be known as the "School House Fund"; and the amount estimated for "Teachers' Fund" shall not, when collected, be paid out or disbursed for any other purpose than the payment of teachers; and the amount estimated for "Teachers' Fund" and for "School-house Fund" shall be certified by the secretary of the board to the county treasurer, and said treasurer shall separate the funds belonging to said district in accordance with said certificate, and shall keep with each of said funds a separate account, and shall not pay any draft or warrant out of any funds other than that on which it is drawn, and shall not pay and draft or warrant that does not specify the fund on which it is drawn, and the use to which it is to be applied; the said board shall, at the same time, estimate the per centum of tax on the taxable property of the district necessary to raise a fund which, with the fund to be apportioned to the district from the general school fund of the State, will produce the amount of money required in the district for that year, which estimated per centum shall be certified to the county court by the president and secretary of the board; and the per centum of tax thus certified shall be levied by the county court upon all the property in the district subject to taxation, at the same time the county taxes are levied, and shall be collected in the same manner as the county taxes are collected, at the same time and by the same officer, and paid into the county treasury, there to be kept subject to disbursement on the order of the board upon warrants signed by the president and countersigned by the secretary, as hereinafter provided. Cash or United States currency only shall be received in payment of such school tax.

SECTION 8. *Be it further enacted,* That no draft or warrant shall be drawn on the county treasurer except in pursuant of an order of said board; that all drafts or warrants on the treasurer shall be signed by the president, or president pro tempore, and the secretary; and all drafts and warrants shall specify the fund on which they are drawn and the use for which the money is assigned.

SECTION 9. *Be it further enacted,* That the secretary shall record all the proceedings of the board in books kept

for that purpose, shall make and preserve copies of all reports required by law to be made to the State or circuit superintendent of public instruction; shall file all papers transmitted to him pertaining to the business of the district; shall make, or cause to be made, the annual enumeration of the youth of the district in the time and manner required by law of school trustees, and shall perform such other duties as the board of directors may order and direct; and for his services may be allowed reasonable compensation, to be audited and allowed by a majority of said board. The other members of said board shall receive no compensation for their services.

SECTION 10. *Be it further enacted,* That the title of all real estate and other property belonging, for school purposes, to any city or town organized into a separate school district under this act, shall vest, and hereby is vested, in said city or town, as a school district, and shall be under the management and control of the board of school directors for said district as fully and completely as other school property belonging to said district.

SECTION 11. *Be it further enacted,* That all school districts formed under and governed by this act, shall be known by the name of the city or town constituting the district, with the words "School District of" prefixed thereto; (as, for example, "School District of Little Rock,)" and by such name may sue and be sued, contract and be contracted with, purchase, acquire, hold and sell property, receive gifts, grants and bequests, and generally shall possess and enjoy all the corporate powers usually possessed by bodies corporate of like character. The style of the board of directors for school districts under this act shall be "Board of School Directors."

SECTION 12. *Be it further enacted,* That the board of school directors of any city or town that may organize under and in pursuance of this act, prior to the first day of March, 1869, shall levy a tax for school purposes on said district for the year 1868, and shall determine the amount of money required, and estimate the per centum of tax and certify the same to the county court in the manner provided in this

act; and if the estimate of said board of the per centum should for any cause not be certified to the county court in time for that court to levy the same and enter it on the general tax books for that year, it shall be the duty of said court to levy said tax and enter the same on a special tax book, which shall be provided by the county court for that purpose; and said tax, so levied, shall be collected in all respects in the same manner as though it had been entered on the general tax books or roll for that year; and, in any city or town which may adopt this act, and levy, as in this section provided, a school tax for the year 1868, under this act, all taxes levied for that year for school purposes by vote of the electors or certified by trustees of the several districts which shall be embraced within the district organized under this act, shall be superseded and annulled, and shall not be collected; and the board of school directors of any district organized under this act shall pay and discharge all debts and liabilities lawfully incurred by the several school districts existing under previous law and embraced in the district organized under this act.

SECTION 13. *Be it further enacted,* That any person elected a director under the provisions of this act who shall fail to take the oath of office and qualify as herein required, or who, after qualifying as such director, shall fail to perform and discharge the official duties incumbent upon him as a director, under the provisions of this act, shall be liable to the same penalties that now are or may be hereinafter provided by law against trustees of school districts for failing or refusing to qualify, or for neglect of official duty.

SECTION 14. *Be it further enacted,* That the board of directors may fix the term of office and define the duties of the board of visitors and examiners of the public schools in their district, and any person appointed by the board of directors a member of said board of visitors and examiners who shall refuse to act as such, and discharge the duties pertaining to such position, shall forfeit and pay to said district the sum of twenty-five dollars, to be recovered in civil action in the name of said district, and added to the "Teachers' Fund" belonging to said district; *Provided,* That no

person shall be compelled to serve in that capacity more than three consecutive years. Said board of visitors and examiners shall receive no compensation for their services.

SECTION 15. *Be it further enacted,* That all school districts organized under this act shall have and receive their full proportion and distributive share of the general school fund of the State, in the same manner and according to the same rule as it is, or may be, apportioned to other districts.

SECTION 16. *Be it further enacted,* That it shall be the duty of the circuit and State superintendents to make such suggestions and recommendations to the board of directors in relation to organizing and conducting the public schools in the districts organized under this act, as they shall deem important, and (in accordance with) the provisions of the general school laws of the State which are now or may hereafter be (in force) when not inapplicable, and, so far as the same are not inconsistent with and repugnant to the provisions of this act; and such provisions of said law as are inconsistent with and repugnant to the provisions of this act, and inapplicable to districts organized thereunder, shall have no operation, force or effect in such districts.

SECTION 17. *Be it further enacted,* That the circuit superintendent shall annex contiguous territory to single school districts, under the provisions of this act, when a majority of the legal voters of said territory and the board of directors of said single district shall ask by petition that the same shall be done.

SECTION 18. *Be it further enacted,* That this act take effect and be in force from and after its passage.

APPROVED, February 4, 1869.

ACT 50.

Acts 1873, Page 109

AN ACT authorizing school districts, under an act entitled "An act for the better regulation of public schools in

cities and towns," to issue bonds for building school houses, and for other purposes.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. The board of school directors of any school district in this state, organized or to be organized under the provisions of an act entitled "An act for the better regulation of public schools in cities and towns," approved February 4, 1869, shall be authorized to issue the bonds of their school district for such an amount and in such sums as they may deem necessary and expedient, for the purpose of building, furnishing or repairing school houses in such school district; the bonds so issued to bear interest at the rate of eight per centum per annum, and to be payable within five years of the date of their issue, in such installments as the board of school directors shall determine; *Provided,* That no such bonds shall be issued by the board of school directors of any school district in this state unless a majority of the legal voters in such school district shall vote in favor of such issue.

SECTION 2. The bonds issued under the provisions of the first section of this act shall be signed by the president and countersigned by the secretary of the board of school directors, and shall first be offered for sale at public auction at some convenient place in the school district for which they may be issued, after first giving not less than twenty days' notice of the time and place of such sale by publication in a newspaper published in such school district, if any such there be; otherwise by written or printed notices, posted in at least three conspicuous places in such school district. If such bonds are not all sold at such public sale, then the balance remaining unsold may be sold at public or private sale, as the board of school directors may determine; *Provided,* That no bonds issued under the provisions of this act shall be sold either at public or private sale at a less price than ninety cents on the dollar of their par value.

SECTION 3. Whenever the bonds of any school district shall be issued and sold under the provisions of this act, it shall be the duty of the president and secretary of

the board of school directors of such school district to make a certified statement of the dates and amount of such bonds, and the date or dates at which the same will become due and payable. Said certified statement shall be filed in the office of the clerk of the County Court for the county in which such school district may be, and each year thereafter the County Court shall, at the time of levying county taxes, levy a rate on the taxable property of such school district, in addition to the amounts levied for ordinary school purposes, to raise an amount of money sufficient to pay such amounts as may become due and payable on such bonds during the succeeding year, and the tax so levied shall be collected by the collector and paid over to the county treasurer, to the credit of such school district, in United States currency, and the county treasurer shall keep such fund separate from all other funds in his hands, and shall only pay the same on the order of the board of school directors, drawn for the purpose of paying such bonded indebtedness of such school district; and the board of school directors of such school district shall not draw any order on the treasurer, payable out of such fund, for any other purpose, until all of said bonded indebtedness shall have been paid and canceled.

SECTION 4. This act shall take effect and be in force from and after its passage.

Approved April 16, 1873.

ACT 46.

Acts 1875, Pages 54-82

AN ACT to be entitled "An Act to Maintain a System of Free Common Schools for the State of Arkansas."

SECTION 87. That an act entitled "An Act to maintain a system of free schools for the State of Arkansas," approved April, one thousand eight hundred and seventy-three (1873), and all other acts, and parts of acts, inconsistent with this act, are hereby repealed; *provided*, that nothing herein contained shall be construed to interfere with the organization of single or special school districts, as con-

stituted by sections five thousand five hundred and fifteen (5,515), to five thousand five hundred and thirty-seven (5,537), inclusive, of Gantt's Digest, the same being for the better regulation of schools in cities and towns.

SECTION 88. That this act take effect and be in force from and after its passage.

Approved December 7th, 1875.

ACT 248 OF 1905

Said Act 248 is found in the Acts of 1905, page 651. Said act consists of four sections and is as follows:

SECTION 1. That all special school districts in Arkansas are hereby authorized and empowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and to mortgage the real property of the district as security therefor, under such conditions and regulations as to time, amount, rate of interest and manner of payment as the Board of School Directors of said school district shall prescribe, and to renew and extend from time to time any evidences of indebtedness or mortgages, or both, issued or made by virtue hereof.

SECTION 2. The said evidences of indebtedness, whether warrants or promissory notes, or both, and mortgages, shall be in form in all respects as other instruments of like kind are required by law to be, and shall have the same force and effect as they would if executed by natural persons, and the warrants shall have the same validity as they would if there were money in the county treasury to pay the same at the time they were drawn, and may be drawn payable in the future, and need not be registered with the county (treasury) until the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date, as the building fund is provided and collected by successive levy and collection, and said special school districts shall be allowed in law or equity no defense merely by reason of the fact that it is a school district.

SECTION 3. Nothing in this Act shall be so construed as to prevent or cut off from any such school districts any right in law or equity which a natural person might claim and assert in like circumstances, and in any action by or against said districts arising on any instrument or contract made under this Act, the district shall, as far as practicable, be deemed and treated as natural persons.

SECTION 4. This Act shall take effect and be in force from and after its passage. All laws and parts of laws in conflict therewith are hereby repealed. Provided, however, that Jefferson County is exempt.

(2 D 19)

No. 354

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IN THE

Supreme Court of the United States

GEORGE E. MORTON, TRUSTEE, AND CITY NATIONAL BANK, AS TRUSTEE, AND INDIVIDUALLY ..... *Petitioners,*

v.

DARDANELLE SPECIAL SCHOOL DISTRICT NO. 15 OF YELL COUNTY, ARKANSAS ..... *Respondent.*

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

GEORGE E. MORTON, TRUSTEE, AND CITY NATIONAL BANK, AS TRUSTEE, AND INDIVIDUALLY ..... *Petitioners*,

v.

DARDANELLE SPECIAL SCHOOL DISTRICT NO. 15 OF YELL COUNTY, ARKANSAS ..... *Respondent.*

BRIEF FOR RESPONDENTS

A.

STATEMENT OF THE CASE

The issues involved in this petition are simple questions of law that have been decided adversely to the petitioners in both the District Court and the Circuit Court of Appeals not only in this case but also in a former case that was based upon an almost identical deed of trust and pledge of school revenues. The Supreme Court of Arkansas has consistently denied the relief sought. As we shall show in the argument, the Circuit Court of Appeals for the Eighth Circuit has analyzed one by one all the Arkansas cases that discuss the power of a board of directors of an Arkansas urban school district under the statutes involved, to pledge the general tax revenues of the district for the payment of bonds and reached the conclusion the power never

existed and there was no contractual obligation that could be impaired.

The Dardanelle Special School District of Yell County, Arkansas, issued bonds in the amount of $55,000, dated March 1, 1926, and in the amount of $105,000 dated January 1, 1931, which issues total $160,000.

With the beginning of the financial depression the Dardanelle Special School District began to default in the principal and interest payments of its bonds.

January 9, 1935, the trustee of the first issue filed a bill in equity praying that the county treasurer and the directors of the district be enjoined from paying out any further revenues of the district. The bill also asked that the directors be required to set up a building fund and pay into the same the equivalent of nine mills of the district's taxes.

January 25, 1935, an order was entered directing the defendant district to set up the building fund as prayed in the bill. Subsequent to that time the validity of the second bond issue was contested by other bondholders. But June 28, 1938, the court entered its order declaring the bonds to be valid, and directing the district to continue to set aside and pay over to the bondholders the sum of 9 mills of the district's 18-mill tax. The court expressly retained jurisdiction of all parties and of the cause to enter such further orders as might be necessary.

Finding that one-half of the district's 18-mill tax was not sufficient to take care of the district's indebtedness, the bondholders filed a petition asking that the court enter its order in the case directing the district to pay over all of its revenues from the 18-mill tax to the bondholders.

There followed a delay during this time in which the parties were negotiating with the view of refunding the district's indebtedness. It developed, however, that the bondholders were not willing to reduce the principal and interest of the proposed refunding issue to such an extent that the district would be able to meet their obligations as they accrued.

In the meantime, this Court had decided the Erie Railroad Case, 304 U. S. 64, holding that federal courts were obligated to follow the decisions of the respective state courts in diversity of citizenship cases.

Under the authority of the Erie Case, 304 U. S. 64, the Eighth Circuit Court of Appeals decided the case of *Women's Catholic Order of Foresters* v. *North Little Rock Special School District,* 105 F. (2d) 716, which case held that under the laws of Arkansas, there was no power on the part of the directors of a special school district to set aside a specific building fund tax from year to year in the absence of same being specifically voted by the electors of the district from year to year.

Relying upon the above decisions, the defendant district, in response to the petition by the bondholders for the entire 18-mill tax, filed its motion to dismiss, its answer and its counterclaim. This pleading set up that under the law as it was now expounded by Federal Courts and the Supreme Court of Arkansas, there was no legal authority for the entry of a restraining order directing the setting aside of any portion of the millage of the district.

The bondholders, having originally invoked the jurisdiction of the federal district court on the grounds of diversity of citizenship, filed an amendment to their petition

alleging that to deny them the relief prayed for would constitute an impairment of the obligation of their contract in violation of the Constitution of the United States.

The district court being of the opinion that it should follow the decisions of the Supreme Court of Arkansas, dismissed the petition of the bondholders.

It was found by the court that the electors of the district have never voted a building fund millage tax for the payment of the bonds of the district; that the school district has reduced its operating expenses to a minimum and that it has reduced the salaries of its teachers to such an extent that it is difficult to secure and keep competent teachers; that the district is in default of its insurance premiums and special taxes and is in danger of loss by fire or loss by foreclosure of tax liens and that the district cannot continue to function and serve the community if the order remains in force requiring it to pay over to the bondholders nine mills of its 18-mill tax and that to increase the present millage now paid to the bondholders or to continue same in force will result in closing the schools of the defendant district.

It was agreed by the defendant district that the bondholders were probably entitled to that portion of the revenue derived from the State Apportionment Fund from sources other than the sales tax, and since that amount approximated the amount received from a tax of 6 mills on the assessed valuation of the property in the district, a consent order was entered directing the setting aside of the revenue from six mills of the defendant district's tax until there appeared a discrepancy between the amounts received from

the state apportionment fund and from a 6-mill tax on the assessed valuation of the property within the district.

The decision of the district court was appealed to the Eighth Circuit Court of Appeals at which time all points now raised in the petition for a writ of certiorari were thoroughly briefed and argued before that court.

In affirming the district court, the Circuit Court of Appeals decided the following points: (1) The pledge of the general tax revenues of the district by the board of directors in the bond indenture was, under the laws of the State of Arkansas involved and the decisions of the federal courts, void and unenforceable. (2) That there have been no changes in its decisions by the Supreme Court of Arkansas relative to the law applicable to the rights of the bondholders. (3) That even had there been such a change in its decisions by the Supreme Court of Arkansas, such change would not have constituted an impairment of the obligation of the bondholders' contract in violation of the Constitution of the United States, since such prohibition applies only to impairment by legislative action. (4) And that Amendment No. 11 to the Constitution of the State of Arkansas did not impair the obligation of the contract contained in the 1926 issue, since there was no enforceable obligation which could have been impaired.

From this decision the bondholders have petitioned this Court for a writ of certiorari to the Eighth Circuit Court of Appeals.

B.

STATEMENT OF POINTS ARGUED AND AUTHORITIES RELIED UPON

I.

Petitioners Never Had an Enforceable Contract for Any Tax Revenue

AUTHORITIES

American Exchange Trust Company v. *Trumann Special School District,* 183 Ark. 1041, 40 S. W. (2d) 770;

Horne v. *Paragould Special School District No. 1,* 186 Ark. 1000, 57 S. W. (2d) 568;

Pledger v. *Cuttrell,* 189 Ark. 562, 74 S. W. (2d) 646;

Schmutz v. *Special School Dist. of Little Rock,* 78 Ark. 119, 95 S. W. 438;

Special School District of Malvern v. *Speer,* 75 F. (2d) 420;

Act 169 of Acts of Arkansas of 1931, page 476;

C. & M. Digest of Statutes of Arkansas, Section 8977;

Section 10, Article 1, Constitution of United States;

Section 1, Amendment 14 to Constitution of United States;

Amendment No. 11 to Constitution of Arkansas.

II.

There Is No Constitutional Question to Be Passed Upon

AUTHORITIES

Erie Railroad Co. v. *Thompkins,* 304 U. S. 64;

Horne v. *Paragould Special School District No. 1,* 186 Ark. 1000, 57 S. W. (2d) 568;

Pledger v. *Cuttrell,* 189 Ark. 562, 74 S. W. (2d) 646;

Schmutz v. *Special School Dist. of Little Rock*, 78 Ark. 119, 95 S. W. 438;

Tidal Oil Company v. *Flanagan*, 263 U. S. 444, 68 L. Ed. 382;

Act 169 of the Acts of Arkansas of 1931, page 476;

Act 169 of Acts of Arkansas of 1931, Section 60;

Pope's Digest of the Statutes of Arkansas, Section 11686;

Amendment No. 11 to Constitution of Arkansas.

III.

Discussion of Petitioners' Argument

AUTHORITIES

Hubble v. *Leonard*, 6 F. Supp. 145;

Shapleigh v. *San Angelo*, 167 U. S. 648;

Special School District of Malvern v. *Speer*, 75 F. (2d) 420;

U. S. v. *City of New Orleans*, 98 U. S. 381, 25 L. Ed. 225.

C.

ARGUMENT

I.

PETITIONERS NEVER HAD AN ENFORCEABLE CONTRACT FOR ANY TAX REVENUE

Petitioners contend that the laws and decisions of the Supreme Court of the State of Arkansas, existing at the time of the issuance of petitioners' bonds and under the authority of which they were issued, entered into and became a part of the contract between the respondent and petitioners, in such a way that the obligation of the contract could not thereafter be in any way impaired or its fulfillment hampered or obstructed by a legislative or judicial fiat; but the petitioners cannot, under the laws and decisions of the Supreme Court of Arkansas as they existed on March 1, 1926, and January 1, 1931, the dates when these bonds were issued, definitely determine what rights they had for the payment of those bonds and whether there was any definite pledge of revenues of the defendant district. A review will show that no decision of either the Arkansas Supreme Court or of this court has ever stated definitely that the directors of a city special school district, prior to Act 169 of 1931, (page 476 of Acts, 1931) had the power to create a building fund from the first revenues of the district and definitely pledge that building fund to the payment of school bonds.

The law of Arkansas, prior to Act 169 of 1931, raised serious doubt as to just what fund, if any, could be pledged by a city special school district for the payment of its bonds. The law definitely gave rural special and consolidated districts the right to vote a continuing millage for a

building fund that would run until all the bonds and interest were paid. But the city special district did not have the power to vote a building fund.

The only case dealing with the rights of bondholders that had been decided by the Arkansas Supreme Court at the times these bonds were issued was the case of *Schmutz* v. *School District of Little Rock*, 78 Ark. 1118, 95 S. W. 438, in which the Arkansas Supreme Court, construing a special act, made the statement usually quoted which is as follows:

> "* * * The act under which the bonds were issued provides that the evidence of indebtedness issued by the district shall be 'paid out of the building fund in the order of their date, *as the building fund is provided and collected by successive levies.* This, in effect, pledges the building fund of the district, *whatever that may be,* to the payment of the bonds. Besides, as the bonds are valid obligations, it was evidently the intention of the Legislature that they should be paid out of the revenues of the district, and they are therefore a charge against such revenues as any other valid debt would be. * * *" (Italics supplied.)

This seemed to carry the power to pledge revenue, but if we examine the wording in the light of later decisions, it is not as positive as it first appears to be. We note, upon re-examination, the phrase, "This, in effect, pledges the building fund of the district, whatever that may be, to the payment of the bonds." The opinion did not say that the directors could pledge the revenues of the district but that the statute in effect pledged the building fund, and the court expressly states that there is uncertainty as to what a building fund may be. The building fund in the rural special or consolidated district was the voted millage, but there was no millage in the case of the city special district.

The confusion grew out of the fact that the law was not a well formulated program but rather a growth from the old law which required even city special districts to submit to the voters of the district the question of bonds and, at the same time, submit also the question of a millage to provide a building fund to pay these bonds. When the law was amended to omit the requirement of an election on the question of issuing bonds, it left the phrase, "building fund," in the law but made no provision for establishing such a building fund. The boards of directors of various city special school districts undertook to supply this omission by an artificial building fund created by setting aside out of first revenues of the district a certain estimated amount necessary to pay bonds and interest in each year and terming it the building fund, and, then pledging this artificial building fund for the payment of the bonds. Now this is exactly what has happened in the instant case. These bonds were issued when there was no authority in the School District to vote a building fund, but the School Board tried to supply this lack of statutory authority by the creation of an artificial building fund in which it set aside the first revenue for the payment of bonds. There was no authority in the law for the so-called building fund and the bondholders had no certain fund available for their protection by reason of the action.

Going back to the part of the Schmutz case, *supra*, just quoted, in addition to saying that the statute pledges the building fund, whatever that may be, the decision goes on to say that the bonds shall be paid out of the building fund as it is provided and collected by successive levies. This was thought to mean that while there was no way to compel

the district to levy and collect taxes, yet if it did levy and collect taxes, the first revenues would be pledged.

Again, going back to the Schmutz decision we find the conclusion (pp. 122, 123) which is rarely quoted but in view of later decisions is now quite illuminating. The court said:

> "* * * But, if we concede that the directors had no authority to pledge the revenues of the district in that way, this would not justify us in enjoining the issuance of the bonds, for, if the directors exceeded their powers in that respect, this provision of the bond would not estop the district, or bind the successors in office of the directors who issued the bonds. For, the question of whether the district has power to pledge its revenues was not committed to those directors for ascertainment and decision. Their decision on that matter is no more binding than their opinion on any other question of law affecting these bonds."

It will thus be noted that the Schmutz case definitely raises doubt as to the authority of the school directors to pledge the revenues of the school district at all. As long as the city special school district paid their bonds and interest this decision was sufficient, but when defaults began to occur it became important to obtain a more definite statement of the rights of bondholders to some definite share of school revenue.

American Exchange Trust Company v. *Trumann Special School District*, 183 Ark. 1041, 40 S. W. (2) 770, was an effort to clarify these rights and to enforce the agreement on the part of the district to set up this artificial building fund for the protection of the bonds. If the bonds were simply to be paid out of revenue as any other obligation of the district, then they would have no priority but would have to be registered as school warrants and

paid in order of registration; this was unsatisfactory because it meant delay and uncertainty as to time of payment. It was the contention of the bondholders that the agreement of the district to set up the building fund out of first revenues could be enforced so that a definite fund for the payment of the bonds and interest would be available whenever they were presented. The court refused to require the Trumann Special School District to set up a building fund. It said it was true that the bonds were a charge against the whole revenues of the district, but the district should not be compelled to set aside revenues into a building fund for the payment of unmatured bonds. The decision was certainly most unsatisfactory because it denied the prayer to enforce the agreement to provide a building fund and left the bondholders in the position of common creditors of the district, without a definite share of the revenues and if the district should refuse to vote a tax at all, without any revenue, although the mortgage lien remained on the real property. What benefit was it to say to the bondholders that the school directors could provide a building fund if the court refused to enforce their agreement to do so?

The Eighth Circuit Court of Appeals has examined the Schmutz case and the Trumann case on which appellants place their main reliance, in the case of the *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock,* 105 F. (2d) 716, and analyzes them on page 719 as follows:

> "The language of these two cases lends some plausibility to the position taken by the plaintiff. But the question is one inherently 'local in origin and content.' In the Schmutz case the court did not hold that the directors had power to pledge the revenues of the

district, but rather that the statute in effect pledged the building fund, and the court seemed to be in doubt as to what the building fund might be. These bonds were issued in 1924, at a time when there was no specific authority in the directors of the school district to vote a building fund, but nevertheless, the directors assumed the authority to create such a fund. It is noticeable too that the decision in the Schmutz case points out that the bonds therein involved should be paid out of the building fund as provided and collected by successive levies. But we think it significant that in the Schmutz case the court should have pointed out that even if the directors had no authority to pledge the revenues, the issuance of the bonds should not be enjoined 'for if the directors exceeded their powers in that respect this provision of the bond would not estop the district or bind the successors in office of the directors who issued the bonds. For the question of whether the district has power to pledge its revenues was not committed to those directors for ascertainment and decision.'

"*In American Exchange Trust Co.* v. *Trumann Special School District, supra,* the bondholders contended that the agreement of the district to set up a building fund out of the first revenues was enforceable and if enforced a definite fund for the payment of the bonds and interest would be available. The court, however, refused to require the school district to set up such a fund. It said that the bonds were a charge against the whole revenues of the district but the district should not be compelled to set aside revenues into a building fund for the payment of unmatured bonds. This in effect left the bondholders in the position of common creditors of the district. In fact, in the Schmutz case, the court in referring to the bonded indebtedness being a charge against the revenues of the district, apparently spoke in the most general terms because it reached its conclusion simply because they were valid obligations and they were 'a charge against

such revenues *as any other valid debt would be'.*" (Italics in opinion.)

The case of *Horne* v. *Paragould Special School District No. 1,* 186 Ark. 1000, 58 S. W. (2d) 568, squarely raised the rights of bondholders to school revenues under a building fund provision and pledge that are substantially the same as in the case at bar. The district had an approximate total of $400,000.00 in outstanding bonds of several issues, some of which were issued in 1924 and 1925. In 1931, a six-mill tax was voted for building or bond payment fund and twelve mills for general school purposes. The six-mill tax produced $11,020.62 annually, but the annual interest requirements alone were $20,000.00 and principal and interest together were over $40,000.00. It was evident that six mills would not pay the bonds and interest as they became due, in fact it would never pay the interest alone at the contract rate.

The Arkansas Supreme Court re-examined its former decisions and held that the bondholders were limited to the six mills voted for a building fund. We think the decision controls this case. The court said:

> "The issue to be determined by this court on this appeal is succinctly stated by counsel for appellee as follows: 'Whether or not the directors of an urban special school district under the law as it stood at the time of the issue of the said bonds had authority of law to make, without submission of the question to the electors of the district, a pledge of all the proceeds of the 18-mill tax for the sole purpose of paying bonds and interest when future levies thereof were not and could not be within the control of the school board (or of the Legislature itself, for that matter) but depended for their existence on the favorable annual vote of the electors of the district.' * * *

"Appellant contends that Section 8977, Crawford & Moses' Digest, and the decisions of this court in *Schmutz* v. *Special School District of Little Rock*, 78 Ark. 119, 95 S. W. 438, and *Am. Ex. Trust Co.* v. *Trumann Special School Dist.*, 183 Ark. 1041, 40 S. W. (2d) 770, support his contention that all the revenue may be pledged, said section provides: 'To borrow money and mortgage the real property of the district as security therefor under such conditions and regulations as to amount, time and manner of payment as the board of directors of said school district shall prescribe.' This section authorizes the directors to mortgage the real property of the district to secure the money borrowed, and permits them to fix the time and manner of payment. It does not authorize them in specific terms to pledge any revenue, and it could not authorize them to pledge any part of the 18-mill tax voted for any other purpose. Neither the Schmutz nor the Trumann Special School District case, *supra*, discussed the exact question now under consideration. * * * "

The gratuitous statement on page 35 of petitioners' brief that the Horne case was a "friendly suit" is not correct; and the briefs will show that the case was vigorously contested and the identical arguments relative to the impairment of contract raised by petitioners here were presented to and adversely ruled upon by the Supreme Court of Arkansas.

Because the case of *Pledger* v. *Cuttrell*, 189 Ark. 562, 74 S. W. (2d) 646, which is the last statement of the Supreme Court of Arkansas on the subject of the division of school revenue between maintenance and operation of schools and the retirement of existing debts, quotes extensively from the Paragould case, it will be enough to quote from the Pledger case as follows:

"The school fund here under consideration arises and accrues exclusively under Amendment No. 11 to

the Constitution of 1874, which provides: 'The General Assembly shall provide by the general laws for the support of common schools by taxes which shall never exceed in any one year three mills on the dollar on the taxable property in the State, and by an annual per capita tax of one dollar, to be assessed on every male inhabitant of this State over the age of twenty-one years. Provided, that the General Assembly may, by general law, authorize school districts to levy by a vote of the qualified electors of such districts a tax not to exceed 18 mills on the dollar in any one year for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness for buildings. Provided, further, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied.

"It appears from the 11th amendment last quoted that it levies no taxes and that no tax may be levied thereunder save by an affirmative vote of the qualified electors of the school district in which such levy is sought, and then such levy is limited to 18 mills on the dollar in value for any one year. Therefore it definitely appears that the levy of any tax under this amendment is exclusively optional with the qualified electors in the school district affected. On the question here under consideration we decided in *Horne* v. *Paragould Special School District*, 186 Ark. 1000, 57 S. W. (2d) 568: 'Three purposes are named in the amendment (1) "for the maintenance of schools"; (2) for "the erection and equipment of school buildings"; and (3) for "the retirement of existing indebtedness for buildings." And it is then provided "that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied." This appears to be very simple language, unambiguous, and not difficult of comprehension. The electors of any school district may vote a tax at any rate they wish for any or all said purposes, provided the tax voted for all does not exceed 18 mills. For instance, they might vote 6 mills for bond and 12 mills for school

purposes, as they did in this case, and, when so levied and collected, neither sum could "be appropriated for any other purpose * * * than that for which it is levied." In other words, the 12 mills voted for school purposes could not lawfully be appropriated for payment of bonds or the interest thereon, nor could the 6 mills voted for bond purposes be appropriated for schools. Such is the plain language of the amendment. No other construction can be given, and any other in the present case would probably work disaster to both parties. For, since the voting of any tax for any purpose is optional with the district electors, the taking of the 12 mills voted for general school purposes to pay bonds would close the schools and keep them closed for many years, it would seem reasonably certain the electors would not vote a tax on themselves and have no schools. The bondholders would lose the 6-mill tax now being received, a substantial loss to them, and the district would be without a free public school for years to come, which would be disastrous to it and its people.'

"It follows from what we have said that neither creditors nor any one else can acquire a vested right or interest in or to any levy of taxes under Amendment No. 11 or to any part thereof until same has been voted by the qualified electors each year." * * *

This case finally settled the law in Arkansas, but meanwhile certain bondholders tried to get the federal courts to enforce their contract for a building fund and pledge thereof made by an urban special school district. This was the case of *Special School District of Malvern, Hot Spring County, Arkansas, et al.*, v. *Speer*, 75 Fed. (2d) 420, decided on February 5, 1935, but the court definitely refused to pass upon the merits of the controversy, and said: "It is perhaps sufficient to say that the case presents difficult and doubtful questions of law, including the question of the constitutionality of certain state statutes as applied to the facts involved." The court held that the district

court had not abused its discretion in refusing to dissolve an injunction but said:

> "An examination of the record discloses the execution of the bonds, the default in payment of interest thereon, the execution of the trust deed, which in form admittedly pledges the district to establish a building fund, and pledge the revenues to sustain such fund. Whether or not the defendants may defeat these contracts depends upon the construction to be given to certain statutes of Arkansas and certain decisions of the Supreme Court of Arkansas, and may involve the question of the constitutionality of certain of these statutes. In this condition of the record, we are clear that we should not attempt to pass on the merits of this case, and we refrain from expressing any opinion on its merits, further than to say that it involves difficult, if not doubtful, questions of law."

Petitioners go into an extended discussion of the argument that the Horne and Pledger cases impair the obligations of their contract in violation of Section 10 of Article I and Section 1 of the 14th Amendment to the Constitution of the United States. The cases which they cite in support of this argument are the cases that have been the familiar authorities for this argument throughout the ten years that the meaning of the Arkansas school law has been under judicial interpretation. The contracts in this case are practically identical with the contract involved in the case of *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock,* 105 F. (2d) 716, and the arguments which are advanced here and many of the authorities cited here are the same arguments and the same authorities submitted in that case, which was decided July 27, 1939. We take the position that there has been no new question introduced in this case, except the claim of the appellants that the decisions of the Arkansas Su-

preme Court, together with Amendment No. 11 to the Constitution of Arkansas and Act 169 of 1931, impair the obligations of their contracts in violation of the restraints of the Federal Constitution. In order to have a basis for consideration for this question, there must be an enforceable contract to be impaired. Prior to the issuance of these bonds, there was only one Arkansas Supreme Court decision that construed the rights of bondholders in the revenues of a district, and this was the Schmutz case which does not hold that the directors have the right to pledge any revenues.

II.

There is No Constitutional Question to Be Passed Upon

The only colorable claim of impairment which could be made by the petitioners is that the adoption of Amendment No. 11 to Article 14, Section 3 of the Constitution of the State of Arkansas of 1874 constituted an impairment of the obligation of the contract in the bond issue of 1926, executed prior to the adoption of Amendment No. 11.

However, it is easily observed from an examination of the Constitution as it stood prior to the adoption of Amendment No. 11 that the Legislature could authorize a school district to vote 12 mills for school purposes, but could not permit the proceeds from the levy to be diverted to any other purpose than that for which the levy was made.

Amendment No. 11 did nothing more than to increase the permissible millage from 12 mills to 18 mills, if the Legislature by general law permitted the districts to do so, and provided the tax could be voted for the maintenance of schools, the erection and equipment of school buildings,

and retirement of existing indebtedness for buildings. However, the same provision that the revenues could not be diverted to any other purpose was carried in Amendment No. 11.

It was held in the Horne case and the Pledger case that Amendment No. 11 did not levy a tax nor could the bondholders have a vested right in the taxes levied under such authority. By the same reasoning, this rule was applied to the Constitution as it existed prior to the Amendment. As was stated by the Circuit Court, "that which was no an enforceable contract right was not an obligation which could be impaired within the meaning of the constitutional prohibition."

Petitioners take the position that the obligation of their contract has been impaired by the Supreme Court of Arkansas by decisions rendered subsequent to the Schmutz case. As previously stated, the Circuit Court of Appeals held that there has been no change in its decisions by the Supreme Court of Arkansas, but that decisions rendered subsequent to the Schmutz case were but clarifications of that decision.

However, even had there been a distinct reversal of its former decisions by the Supreme Court of Arkansas, such reversals would not constitute an impairment of the obligation of the contract within the meaning of the Constitution of the United States, since such prohibition is directed only to legislative action.

For a considerable period of time there existed the erroneous belief that the obligation of a contract could be impaired by judicial decision. This belief originated in the freedom of the Federal Courts in diversity of citizen-

ship cases to follow the rule of law as it saw fit, and in such cases the Federal Courts frequently refused to follow a change in decisions by a State Court, when to do so would work an injustice.

The case of *Tidal Oil Company* v. *Flanagan,* 263 U. S. 444, 68 L. Ed. 382, very definitely states that a contract can not be impaired by judicial decision.

It is well settled by the Erie Railroad Case, 304 U. S. 64, and those rendered subsequent thereto that the Federal Court must follow the decisions of the State Courts in all questions of general jurisprudence; and it has always been the law that Federal Courts are bound by the laws of the state and the construction placed upon its laws by the highest court in that state. The above statements of law are too well settled to burden this Court with citations and quotations from the cited cases.

It is not the attitude of the Dardanelle Special School District to avoid the payment of its just obligations. It recognizes that the bonds involved in this case are valid and legal obligations of the district. However, the district is encumbered with indebtedness far beyond its ability to pay.

A revolving loan fund has been created in this state to enable districts that are financially embarrassed to borrow money from this fund to retire its bonded indebtedness. It is provided in Section 11686 of Pope's Digest of the Statutes of Arkansas that a loan from the revolving loan fund can be obtained provided it appears that if all of the bonds issued by the district could be bought at the same discount the debt could be reduced to not more than 10% of the assessed valuation of all the real property in the district. The assessed valuation of this district is $729,767,

and on this basis the district could borrow $72,976.70. This is the largest amount which could be borrowed and the only source from which the money could be obtained. The loan would enable the district to pay about 45 cents on the dollar for the face of the bonds, remitting all past due interest. This is all that the bonds are reasonably worth, and though the district is willing to avail itself of the right to a revolving loan, the bondholders are not willing to surrender their bonds. It is also revealed by the record in this case that in 1930 the assessed value of the property in the district was $1,276,645 and it is now only $729,767.

The record also reveals some additional significant facts. At the time the January 1, 1931, bonds were issued the district had outstanding at least $54,000 of the $55,000 issue of 1926. At that time the assessed value of the property in the district was $1,276,645, and the 1931 issue of $105,000 increased the indebtedness of the district to over 12% of its assessed value as it stood at that time. These bonds bore an interest rate of 5½%, an increase of ½ per cent over the earlier issue and is in itself indicative of an increased financial risk. While this second issue is dated January 1, 1931, the deed of trust securing it was recorded on March 24, 1931, at 8 o'clock P. M., whereas Act 169 of 1931 with its emergency clause was approved and became effective on March 25, 1931. Section 60 of said Act provides that no district shall issue bonds that would make the total outstanding bonded indebtedness at that time exceed 7% of the assessed valuation of the real and personal property in the district as shown by the last assessment. Act 169 of 1931 was a sweeping revision of the school laws, and its introduction and passage was given state-wide publicity. The bond issue of 1931 was a patent evasion of that law and

was executed the day before the effective date of Act 169 with its beneficial limitation of 7%. Subsequent events have shown how wise a safeguard both for districts and investors is the 7% limitation on a district's bonded indebtedness.

III.

Discussion of Petitioners' Argument

On page 15 of their brief petitioners make the sweeping statement that the decision of the Circuit Court of Appeals in this case is in direct conflict with an earlier decision by the same court in the case of *Special School District of Malvern* v. *Speer*, 75 F. (2d) 420. We have already shown that the Circuit Court of Appeals specifically refused to pass upon the merits of the issues raised in that case.

The case of *Hubble* v. *Leonard*, 6 F. Supp. 145, cited by petitioners, was a proceeding to enforce the payment of certain highway bonds issued by the State of Arkansas, and had nothing to do with school bonds.

Petitioners state that the State has no power under the Constitution of the United States to give authority to taxpaying voters to impair the obligation of a contract, and cite the case of *Shapleigh* v. *San Angelo*, 167 U. S. 648.

With that statement we are thoroughly in accord. However, the Shapleigh Case was based upon a state statute which permitted the voters to refuse to assume the obligations of a municipality which had been dissolved and a new municipality created in its stead. Such is not the case here. There has been no new statute passed subsequent to these bond issues which in any manner affects these bonds. No new power has been conferred upon the electorate by

the Legislature which was not already in existence at the time of the issue of these bonds.

Petitioners also cite the case of *United States* v. *City of New Orleans,* 98 U. S. 381, 25 L. Ed. 225. In that case bonds had been issued by the City of New Orleans, which issue had been authorized by an act of the legislature of that state. However, the statute failed to provide the machinery for the levy and collection of taxes with which to pay these bonds. In that case the court held that the power to tax to pay for bonds which were authorized by statute was necessarily implied from the statute giving power to issue the bonds. The court makes the following statement which distinguishes that case from the instant case:

> "* * * It is, therefore, to be inferred, as observed by this court in *Loan Asso.* v. *Topeka,* 20 Wall. 660, that when the Legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, *unless there is in the Act itself or in some general statute, a limitation upon the power of taxation which repels such an inference.*" (Italics supplied.)

In the case at bar there is no absence of statutory authority for the levy and collection of taxes by this district. Such authority was in existence at all times prior and subsequent to the issuance of these bonds, such statutes became a part of the contract and are binding upon the district and the bondholders with equal force. The only limitation to be found in the statutes in existence at the time these bonds were issued was the limitation which prevented the directors of the district from making a pledge of a specific portion of the district's revenues which would bind the electors and force those electors to continue to vote this tax from year to year.

D.

CONCLUSION

In conclusion, respondent respectfully submits that petitioners have failed to make any showing which would entitle them to a writ of certiorari under Rule 38(b) of the Rules of this Court.

Certainly there is no conflict of decisions between the various circuit courts of appeal as contemplated by the first part of this rule. This case involves an interpretation of the laws of the State of Arkansas, and is, therefore, a matter of law which has never been passed upon by any circuit court of appeal other than that of the Eighth Circuit.

Petitioners state in their petition that the Eighth Circuit Court of Appeals has decided a question of local law contrary to and in conflict with local decisions and the law of the State *at the time of the issuance of these bonds.* While we have shown that there has been no change in its decisions by the Supreme Court of Arkansas, the Eighth Circuit Court of Appeals was constrained to follow the latest decision of the Arkansas Supreme Court under the rule in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, even had there been such a change.

Petitioners also contend that the Eighth Circuit Court of Appeals decided an important question of federal law which has not been but should be settled by this court. It is patent that the only propositions of federal law involved herein are the questions of impairment of a contract by an alleged change in its decisions by a state court, and whether a federal court should follow the decisions of the courts of the state in which the suit is brought, both of which questions have been passed upon by this Court numerous times.

At different places in their brief, petitioners go outside of the record in an attempt to convey the idea that the issues in this case are of such importance and the decision will be of such far-reaching consequence that there has never been a question of higher or greater importance before this Court. And we, with equal propriety, go outside of the record to state the fact that the effect of this decision will be very limited, because over 95% of the school districts of Arkansas have refunded their outstanding bonds under the provisions of Act 169 of 1931 and have voted continuing millage taxes for their respective building funds, so that neither they nor their bondholders are any longer interested in or affected by any decision as to rights of bonds issued prior to Act 169 of 1931.

We, therefore, respectfully urge that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

GEORGE E. MORTON, TRUSTEE, AND CITY NATIONAL BANK, A BANKING CORPORATION, AS TRUSTEE, AND INDIVIDUALLY ..... *Petitioners,*

v. No. 354

DARDANELLE SPECIAL SCHOOL DISTRICT NO. 15 OF YELL COUNTY, ARKANSAS ..... *Respondent.*

REPLY BRIEF FOR PETITIONERS

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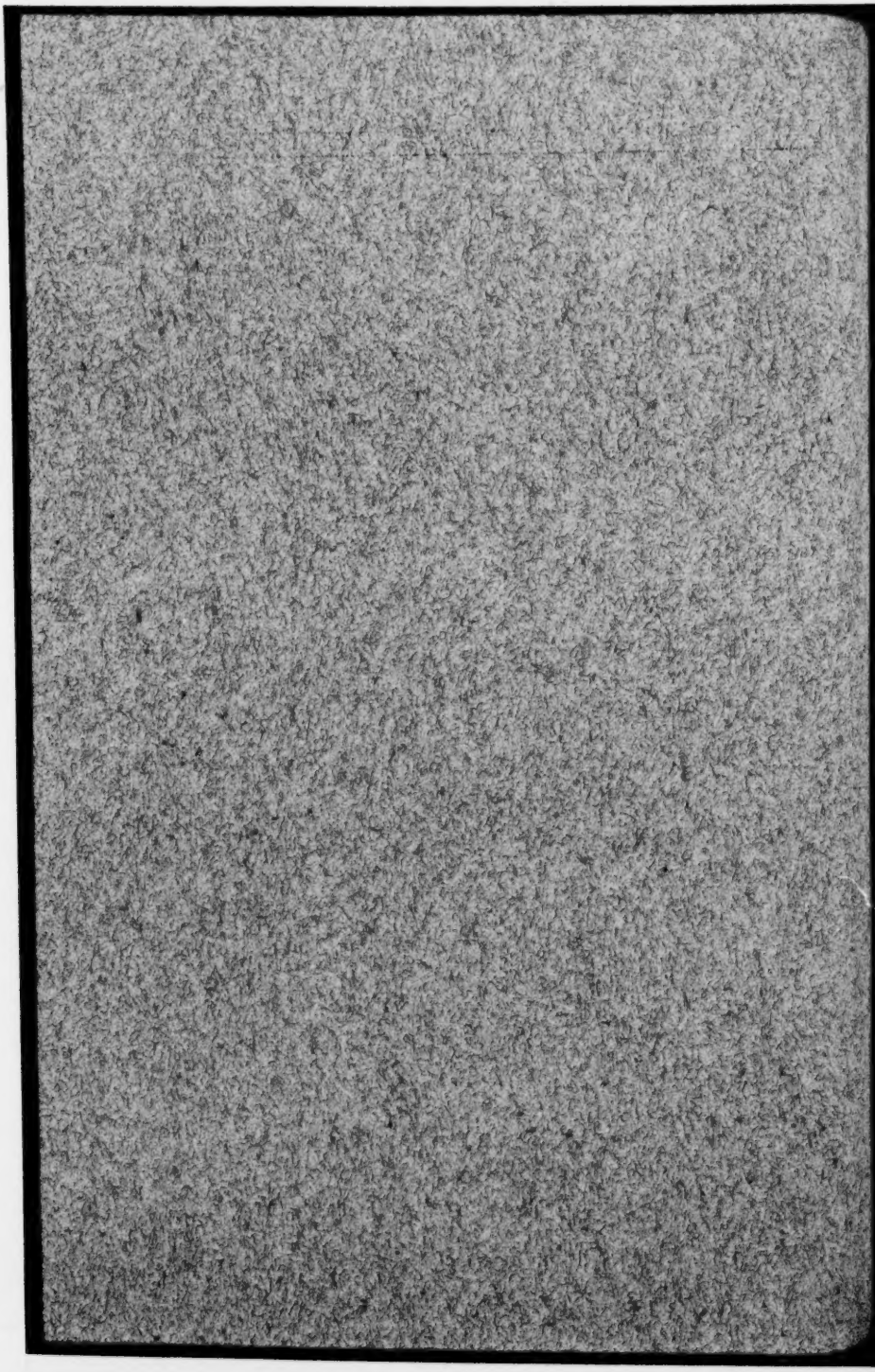

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REPLY BRIEF OF PETITIONERS

ARGUMENT

A.

Respondent Fails to Grasp the Constitutional Question Herein Involved

Section 10 of Article 1 of the Constitution of the United States provides: "No State shall * * * pass any * * * law impairing the obligation of contracts."

The object of this provision was to prevent just the thing that is now sought to be done in this case. Section 14 of the Constitution of the State of Arkansas by specific words recites: "Intelligence and virtue being the safeguard of liberty and the bulwark of a good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State

between the ages of 6 and 21 years shall receive gratuitous instruction." (Art. 14, Sec. 1, Constitution of Arkansas, Pope's Digest, page 146.)

Section 3 then charges the General Assembly with the responsibility to pass the necessary laws to provide for the support of common schools by taxes, etc. The Legislature from time to time passed various acts heretofore cited in an attempt to carry out this mandate contained in the Constitution, the act in question being Act 248 of 1905 heretofore cited. There did not have to be any specific language in that act authorizing the pledging of anything except the real estate, it being well known by everyone that the only revenues a school district had was from the levy of taxes. This authority was sanctioned by the State's Constitution. Thereafter respondent district issued these bonds and pledged its revenues for their payment. This was a contract.

Section 4 of said Article 14 also provides: "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided by the General Assembly."

The respondent admits that the bonds are valid; it admits that it owes the debt expressed; it says by its answer and cross-complaint (R. 83) that it will not pay its bonds and interest because it needs the money for other purposes. It therefore in effect admits the impairment of the contract to repay. It claims that the directors were without power to pledge the revenues. It does *not* claim that it has made provision for the payment. The repayment, therefore, is impaired by Act 169 or 1931, and Act 28 of 1933 as construed by the Supreme Court of Arkansas

in the Horne and Pledger cases. We have urged in our petition and brief that the directors had the power—they had the power because they were authorized to issue bonds. In the case of *Pertuis* v. *Williams,* 137 Ark. 425, 208 S. W. 789, the court said:

> "Article 14 of the Constitution of 1874 provides for a suitable and efficient system of free schools. Section 4 provides that the supervision of the public schools, and the execution of the laws regulating the same, shall be vested in and confided to such officers as may be provided for by the General Assembly. Pursuant to this article of the Constitution, our General Assembly has provided for a comprehensive system of public schools and has confided the management and regulations of the same to a board of directors." (Italics ours.)

It was also held in the case of *A. H. Andrews* v. *Delight Special School District,* 95 Ark. 26, 128 S. W. 361, that the directors have full power, there the court said:

> "The rule respecting such powers is that, in addition to the powers expressly given by statute an officer or board of officers, he or it has by implication such additional powers as are necessary for the due and efficient exercise of powers expressly granted or which may be fairly implied from the statute granting the express powers."

We urge that the above cases cited in our original brief have been entirely overlooked by learned counsel for respondent in their brief, and were not considered by the Supreme Court in the cases construing Act 169.

B.

Respondent Claims in Its Brief and in Its Pleadings (R. 83) *That if the Eighteen Mills are Used to Pay for Buildings It Cannot Operate Its Schools*

The district court held that the vote of 18 mills without expressing the purpose for which the mills were voted prevented the use of any part of said mills for the payment of the bonds, which were issued for the constructing of buildings. Amendment No. 11 as admitted by respondent's brief (page 19), made no change except to increase the mills which could be voted from 12 to 18. There was no law in Arkansas prior to Act 169 which gave any power to electors to impair the obligation of a contract to issue bonds and to repay said bonds. Amendment No. 11 names three purposes for which the 18 mills may be levied: maintenance of schools; constructing of buildings; and payment of debts due to construction of buildings. These three purposes are all school purposes. In the case of *School Dist. of Hartford* v. *West Hartford School Dist.*, 102 Ark. 261, 143 S. W. 895, it was held that a vote of the electors for teachers' salaries could be used for building purposes, and that a vote of mills for building purposes could be used for teachers' salaries.

The prohibition in the Constitution prior to Amendment No. 11, as well as in Amendment No. 11, did not prevent the use of taxes levied and collected from being used for *any* school purpose named in said amendment. The Hartford case, up to and after the issuance of these bonds, was never altered, reversed or modified. Act 169 as construed impairs the obligation of the contract by giving power to the electors to defeat payment when no such

power was ever contained in any previous act of the Legislature. By voting as they did they impaired the contract to repay.

C.

Erie Railroad and Tidal Oil Cases

Counsel in their brief (page 19) state there is no constitutional question to be passed upon. They call the court's attention to the Erie Railroad case, 304 U. S. 64, and make the broad statement that Federal Courts must follow the decisions of the State Courts in all questions of general jurisprudence. Ordinarily this is true in cases where there is *not* brought into controversy the question of the impairment of an obligation founded upon or based upon a specific act of the Legislature empowering public officials to borrow money and do other acts. The reverse is true where the Supreme Court of a State has placed its stamp of approval upon an act and parties have contracted with each other under such act and the approving opinion of the court. The exclusive power to determine whether there is a contract and whether it is impaired is vested in the Federal Courts when its jurisdiction is properly invoked.

Counsel for respondent also cite the case of *Tidal Oil Co.* v. *Flannagan*, 263 U. S. 444, 68 L. E. 382. That was a case appealed direct from the Supreme Court of Oklahoma. It did not originate in a Federal Court as is true of this case. Chief Justice Taft in his opinion points out with clarity the distinction in these classes of cases. He points out that in the Louisiana and New Orleans cases a statute had been passed subsequently to the contract involved and was held to impair it. He stated:

> "In such a case this court accepts the meaning put upon the impairing statute by the State court as authoritative, but it is the statute, as enforced by the State, through its courts, which impairs the contract, not the judgment of the court."

While denying there was any contract to be impaired, respondent in its brief admitted there was a contract to repay the borrowed money. This is the language in Act 248 of 1905:

> "To borrow money and to mortgage the real property of the district as *security* therefor *under such conditions and regulations as to time, amount, rate of interest and manner of payment as the board of school directors of said school district shall prescribe.*"

No language in granting power to a board of directors could be broader and more all-inclusive. That language is conclusive on this and other courts. The voter is given no voice in determining whether the special school district shall issue bonds. The voter's power to veto the issuance of bonds by a special school district was destroyed by the General Assembly when *that body,* exercising its power under Section 4 of Article XIV of the Constitution of 1874 *imposed upon the school directors of special school districts* "the supervision of public schools and the execution of the laws regulating the same." Hence the said board of directors are the "*officers* as may be provided for by the General Assembly."

The respondent claims that the bondholders are merely common creditors. The Constitution of the United States quoted in the beginning of this brief protects contracts made with common creditors, as well as contracts made with secured creditors. See *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816.

Counsel for respondent attempt to minimize the importance of this question by stating (p. 26) that over 95% of the school districts in Arkansas have refunded their outstanding bonds under the provisions of Act 169 of 1931. There is nothing in the record to substantiate this fact, and with all due respect, it is a misstatement. Had they consulted the State Department of Education, they would have found that actually less than 50% of such bonds had been refunded. They do not deny the correctness of the Comptroller's figures of $23,000,000 of school bonds issued. Though 95% of such bonds *may* have been refunded, there would still be outstanding over one and a half million dollars in such bonds. This is a very considerable amount of money, and petitioners' part of such sum amounts to $185,000.

This is to be said of the opinion in the case of *Pledger* v. *Cuttrell*, 189 Ark. 562, 74 S. W. (2nd) 646: the country at that time was in the throes of a depression. This was really a friendly suit. The action was brought by a taxpayer, not a bondholder, against the County Treasurer. A reading of the case will show that no Trustee for any bondholder was a party to such suit, and the majority opinion in that case was not binding upon the owners of any such bonds, much less owners of issues of other bonds of other districts. Had that been a vigorously contested case and had the case been properly briefed the opinion of the court would have been the dissenting opinion of Mr. Justice Smith, which is reported in 75 S. W. (2nd) 76, in which he very aptly stated:

> "The authority to vote the 18 mills is derived from the 11th Amendment to the Constitution, as is said in the majority opinion, and I submit that a vote 'For

General Tax' includes each and all of these purposes, and it should be assumed, in the absence of a showing to the contrary, that the electors had dedicated the tax to all the purposes shown in the budget report of the school directors. * * *

"A tax thus voted, when not otherwise limited, as was done in the Horne case, *supra*, covers all items for which the tax may be voted. If this is not true, then no tax whatever was voted. There is no more reason for saying the general tax is applicable for maintenance of schools than it is for the retirement of existing indebtedness. Neither was written on the ballot. The electors might have voted a definite number of mills for either purpose, but they did not do so."

CONCLUSION

In respondent's brief (p. 22) the suggestion is made that the mortgage securing the bonds of 1931 was filed 8 o'clock p. m., March 24, 1931, and it is also suggested in said brief that there is an excess of the loan by reason of the amount together with the old bonds exceeding 7% and 10%. The school district cannot in this court or in any other court raise those questions. The school district never filed any pleading alleging that the bonds were invalid. The owners of the 1931 bonds filed their intervention in May, 1935. Evidence was taken and all the facts involving the validity or invalidity of those bonds were brought forth in court and the court, after a full hearing of all the testimony adjudged the bonds valid and rendered a judgment against the defendant school district for the $102,000 in bonds and all past due interest.

That final decree thus prohibits all parties thereto from discussing the validity of the bonds. We, therefore, re-

spectfully request that these references have no bearing upon the merits of the case and it seems to us that they are made for the purpose of prejudicing the Court.

We respectfully pray as in our original brief.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 354.

GEORGE E. MORTON, TRUSTEE, AND CITY NATIONAL BANK, A BANKING CORPORATION, AS TRUSTEE AND INDIVIDUALLY, PETITIONERS,

VS.

DARDANELLE SPECIAL SCHOOL DISTRICT No. 15 OF YELL COUNTY, ARKANSAS, RESPONDENT.

BRIEF OF AMICUS CURIAE.

JUSTIN D. BOWERSOCK,
Counsel for Martin-Holloway-Purcell, As Amicus Curiae.

ROBERT B. FIZZELL,
JOHN F. RHODES,
Of Counsel.

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VS.

DARDANELLE SPECIAL SCHOOL DISTRICT No. 15 OF YELL COUNTY, ARKANSAS, RESPONDENT.

BRIEF OF AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

The undersigned, as counsel for Martin-Holloway-Purcell, respectfully submit the following brief, *amicus curiae*. The written consent of all parties to the case, required by Paragraph 9 of Rule 27 of the rules of this court, has been heretofore filed with the clerk.

Martin-Holloway-Purcell is the firm name of a partnership composed of David H. Martin, Webster W. Holloway and Hoyt Purcell. The business of the partnership consists in dealing in investment securities, largely in bonds and other evidences of indebtedness issued by

municipal corporations of a number of different states. The members of the firm have participated in the purchase and sale, over a period of years, of large amounts of bonds issued by special school districts in Arkansas under the authority and provisions of Act 248 of the Acts of Arkansas, 1905, as amended, some of which bonds are still outstanding. The firm owns no such bonds at this time in its own right or for others, but by reason of its purchase and sale of such bonds, and its interest in the credit of the urban special school districts of the State of Arkansas, it desires to support the position of the petitioners in this proceeding.

The matter presented in this brief is directed primarily to the fundamental question whether, under the statutes and decisions of the Supreme Court of Arkansas existing at the time of the issuance of the bonds here involved, the board of directors of the respondent special school district had power to pledge the tax revenues of the district, as and when the same were annually voted, levied, collected, and received by said district, to the payment of said bonds,[1] even though the board of directors, in the first instance, had no power, either directly or indirectly, to impose or collect any such taxes.

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[1]As, for example, was specifically provided for by Act 318, Acts, 1905, p. 760, entitled "An Act to form School Districts Nos. 16 and 38, in Jackson County, Arkansas, into a special school district to be known as 'Tuckerman Special School District,' and permit the same to borrow money," which act contained the following Section 5:

> "Section 5. Said board of directors is further empowered and authorized to pledge or use such part of the levy of taxes annually of said district for the purpose of paying off said note or notes and the interest thereon, or for creating a sinking fund for such payment as may be necessary."

Eight other special acts adopted by the 1905 Legislature contained specific authority to pledge all or part of the revenues of the districts named. These, and similar acts passed at the 1907 session of the Arkansas legislature, are of the highest importance as the Supreme Court of Arkansas said in 1908 that the general act (Act 248, Acts, 1905) "is broader in its scope than any of the special acts. It covers the whole subject matter embraced by them and the objects designed to be effected are the same" (*Hampton* v. *Hickey*, 88 Ark. 324, 114 S. W. 707).

The petition for certiorari herein, in its Point III, entitled "Questions Presented," states this question, in its Paragraph 2, as follows (p. 7):

> "2. Whether the school directors at the time of the issuance of these bonds had power and authority to pledge, in addition to the mortgage on the lands and buildings, all revenues and resources of the district for the repayment of the borrowed money."

The heading of Point I of the argument in the brief for respondents is (p. 8) "Petitioners Never Had an Enforceable Contract for Any Tax Revenue." This Point I takes up eleven and one-half pages of respondents' brief, out of a total of twenty-six pages, and clearly appears to be their point of strongest reliance. The argument there made is that the board of directors never had the power to pledge the tax revenues of the district, in the first instance, and, consequently, that the covenants made with the purchasers and holders of these bonds, and by other similar districts with the purchasers and holders of similar bonds, pledging the tax revenues, as well as all other revenues, as and when received, never constituted an enforceable obligation. The argument under Point I of the respondents' brief closes with the following sentence (p. 19):

> "Prior to the issuance of these bonds, there was only one Arkansas Supreme Court decision that construed the rights of bondholders in the revenues of a district, and this was the Schmutz case (*Schmutz v. Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438), which does not hold that the directors have the right to pledge any revenues."

It is felt by *amicus curiae* and associate counsel that the power in question not only existed under Act 248, Acts, 1905, and was exercised for over twenty-five years, but with all respect, that, at the end of this long period of time, counsel and the courts may have overlooked relevant

statutes and a number of decisions (in addition to the *Schmutz* case) which we think clearly establish the existence of that power. Perhaps it should not be said that they have been overlooked, even though we have cited, and quoted from, many relevant statutes and decisions not mentioned in the briefs of the parties, but that they have not been presented in the sequence and manner that shows so clearly their true meaning, and, by the same token, shows so clearly the existence of the questioned power. This is to say, therefore, that counsel as *amicus curiae*, while in accord with the position taken by petitioners, is not fully in accord with the course of arguments on this one question.[2]

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[2]The crux of the matter comes with the statement on page 24 of the brief for petitioners that "Said Act 55 of 1905 and Act 248 (Acts of 1905), as amended, *are identical* on the matters under discussion." Act 55, Acts of 1905, was the statute under consideration in the case of *Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438. As we point out below, Section 2 of that act was not, in fact, precisely identical with Section 2 of Act 248, Acts of 1905 (the general act, under which the bonds in question here were issued), but, on the contrary, the variation in language might have been thought to have restricted the application of Act 55 and was, we believe, the reason for the seemingly hesitant language of the opinion in that case which the respondents quote on page 11 of their brief. Not only counsel here, but also the Circuit Court of Appeals in the case of *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock*, 105 F. 2d 716, makes the same assumption, which, we believe, may have largely contributed to the result which has been reached in this case.

II.

ARGUMENT.

Point I. The Historical Development of the Power to Pledge the Revenues, As and When Received, and the Clear Evidence of the Existence of That Power.

The proposition that the board of directors of a special school district could make a valid pledge of tax revenues to be received over a period of years, which they had no power to levy, but which had to be voted affirmatively each year by the electors of the district, as and when the revenue from such levy was received (as well as all other revenues of the district), may appear to be something anomalous, if not startling, but it was a perfectly natural and understandable development of the law relating to school districts in Arkansas.

Act 13, Acts, 1869 (Act of February 4, 1869), provided for the creation of "single" school districts out of incorporated cities or towns,[3] and Section 7 of that act authorized the county court to levy the tax for school purposes upon the certificate of the board of directors of such districts, no election being required. The Act of February 4, 1869, is set out in full in the appendix to petitioners' brief, and Section 7 thereof is set out in full on pages 42 and 43. The power to provide for the

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[3]The apparent derivation of the term was to afford a contrast to the situation existing where there had been two or more school districts in a city or town. The word "single" fell into disuse, and school districts organized in, and occupying all of, incorporated cities and towns became and are known as "special" school districts, and are referred to herein as urban special school districts, where appropriate, in order to distinguish them from rural special school districts, created by special acts of the legislature, organized under the general acts for the organization of rural special school districts (Act 321, Acts, 1909, p. 947, as amended by Act 169, Acts, 1911, p. 141).

levy and collection of taxes for school purposes in this manner (*i. e.*, without an election) was taken away from the directors of all school districts by virtue of the provisions of Section 3 of Article XIV of the Constitution of 1874, at least as to a school tax in excess of two mills on the dollar.

Section 3 of Article XIV of the Constitution of 1874, as originally adopted, read as follows:

> "Section 3. The general assembly shall provide by general laws for the support of common schools by taxes, which shall never exceed in any one year two mills on the dollar on the taxable property of the state, and by an annual *per capita* tax of one dollar, to be assessed on every male inhabitant of this state over the age of twenty-one years. Provided, the general assembly may by general law authorize school districts to levy by a vote of the qualified electors of such a district a tax not to exceed five mills on the dollar in any one year for school purposes. Provided further, that no such tax shall be appropriated to any other purpose nor to any other district than that for which it was levied."

It was apparently thought, for some time after the adoption of the Constitution of 1874, that the restrictions of that section applied only to common schools and not to "single" or special school districts organized in incorporated cities and towns. In the report of the case of *Cole, as Sheriff and Collector,* v. *Blackwell,* (1881) 38 Ark. 271, we find the following report of the argument for the appellant (p. 273):

> "W. N. May, for appellant:
>
> "Argues that Section 5524 and other sections of Gantt's Digest (Section 7 and other sections of the Act of 1869) were not abrogated or repealed by Section 3, Article XIV, Constitution, 1874, but were still in full force and effect. Section 3 manifestly referred *alone* to the common school districts where there

were only three trustees, and not to *special* school districts with six directors under the school law for cities and towns" (italics not supplied).

In the case of *Cole* v. *Blackwell*, *supra*, it appeared that the Dardanelle special school district had been created in 1879 (the same district whose bonds are involved in this proceeding; Petitioners' Brief p. 17). In the same year a large majority of the electors had voted against the levy of a special tax for the support of a free school in the district for the year 1880. Nevertheless, the directors of the district made an estimate to the county court of the amount necessary for that purpose, and the county court proceeded to levy a tax of two and one-half mills therefor. After the board of directors had employed teachers, who had then been teaching for seven months, some resident taxpayers brought an action to enjoin the collection of the tax. The Supreme Court affirmed the decree of the chancellor holding the tax illegal and enjoining its collection. The full opinion, omitting the quotation of Section 3 of Article XIV of the Constitution, and the citation of cases, reads as follows:

"Harrison, J. So much of Section 5524 of Gantt's Digest as conferred authority upon the board of supervisors (now county court) to levy the district school tax in cities and towns, organized into and established as single school districts, upon the estimate of the board of school directors and without a vote of the electors of the district, was abrogated and repealed by Section 3 of Article XIV of the present Constitution, which is as follows:

* * * * * * *

"It is thus seen that the power to levy the tax now belongs to the district and is exercised by a vote of the electors, and belongs to all districts alike, and that the levy of such tax is not within the jurisdiction of the county court.

"The tax sought to be enjoined, having been levied by the county court, and not by the electors of the district, was, therefore, illegal and void."

Thus, from 1881, the date of the decision in the case of *Cole* v. *Blackwell, supra*, we think it was clearly understood that the board of directors of a special school district had no power to levy, or to cause the levy and collection of, any tax for school purposes, and that the tax had to be affirmatively voted in each year by the electors of the district. With the growth of the state, and in particular, with the growth of its cities, very practical considerations made it apparent that the special school districts created coextensively with incorporated cities and towns had many difficulties and problems which were not met with in the rural common school districts. Among these considerations was the constant necessity for additional and larger school buildings, constantly necessitating the raising of large sums of money.

In 1903 the legislature took cognizance of the needs of these special school districts in incorporated cities and towns by the passage of Act 85, Acts of 1903, page 145. This act, in full, reads as follows:

"ACT 85.

AN ACT to authorize special free school districts to borrow money for building purposes, giving the districts the power to mortgage their property for such purpose.

SECTION

1. Authorizes all special free school districts to borrow money and mortgage school property for payment of same.
2. Evidences of indebtedness shall be the same in form as if executed by natural persons, and warrants to have the same validity as if there were money in the treasury to pay same at the time they are issued.
3. School districts to have the same right in law or equity as natural persons.
4. The question of borrowing money shall be submitted to the electors of the school district at the annual school election.
5. Act in effect from passage.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That all special free school districts in the State of Arkansas are hereby authorized and empowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and mortgage the real property of the district as security therefor, under such conditions and regulations as to amount, time and manner of payment as the board of directors of said school district shall prescribe, and renew and extend from time to time any evidence of indebtedness or mortgage, or both, issued or made by virtue hereof.

SECTION 2. Said evidence of indebtedness, whether warrants or promissory notes, or both, shall be in form in all respects as other instruments of like kind are required by law to be, and shall have the same force and effect as they would have if executed by natural persons, and the warrants shall have the same validity as they would have if there were money in the county treasury to pay the same at the time they were drawn, and may be drawn payable in the future and need not be registered with the county treasury till the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date as the building fund is provided and collected by successive levies and collections, and said school district shall be allowed in law or equity no defense merely by reason of the fact that it is a school district.

SECTION 3. Nothing in this act shall be so construed as to prevent or cut off from such school district any right in law or equity which a natural person might claim and assert under like circumstances; and in any action by or against said district arising on any instrument or contract made under this act, the district shall as far as practicable be decreed and treated as a natural person.

SECTION 4. For the purpose of this act, whenever a majority of the directors of any special school district deem it advisable to borrow money for the purpose of building schoolhouses or repairing those

already built or furnishing the same, they shall, thirty days previous to the annual school election, give notice to the electors that such question will be submitted at said annual school meeting, and the electors of said district shall vote for or against authorizing the directors to borrow money under the provisions of this act; and the directors shall not be authorized to borrow money under the provisions of this act unless a majority of the electors voting at said election shall vote for the same.

SECTION 5. This act shall take effect and be in force from and after its passage.

(This bill having remained with the governor five days (Sundays excepted) and the general assembly being in session, it has become a law this March 17, 1903.)"

Possibly because of the fact that the legislature, at its same session in 1903, had passed a number of special acts authorizing special school districts to borrow money, in which no mention was made of the requirement of an election,[4] the legislature re-enacted the above statute in

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[4]The legislature of 1903 had passed eleven of such acts, which are here tabulated:

Act 20, p. 24	Special School District of Atkins
Act 28, p. 49	Booneville Special School District
Act 56, p. 93	Benton Special School District
Act 64, p. 116	Special School District of Walnut Ridge
Act 106, p. 181	Marmaduke Special School District
Act 113, p. 190	Special School District of Rocky Comfort
Act 116, p. 193	Special School District of Clarendon
Act 149, p. 262	Special School District of Pocahontas
Act 177, p. 341	Special School District of Van Buren
Act 185, p. 353	Waldron (Single) School District
Act 191, p. 374	School District No. 23 of Searcy County.

It is significant that with the exception of Act 191, which applied to a common school district, all of these acts applied to special school districts, all authorized the borrowing of money, not one of them so much as mentioned an election, and not one of them mentioned the pledge of all or any part of the revenues of the district. Act 185 (Waldron) is of interest in connection with the *Schmutz* case (*Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438) and is mentioned hereafter.

1905, so as to omit Section 4, which had required an election. This re-enactment was Act 248, Acts of 1905, p. 651. We think it significant that the title was considerably changed and the words "and for other purposes" were added, even though no change whatever was made in the three sections which were re-enacted. For purposes of comparison, we are also setting out this act in full:

"ACT 248.

AN ACT to permit any special school district in the State of Arkansas to borrow money for building purposes, and to mortgage the property of the district to secure the same, and for other purposes.

SECTION

1. Authorizes all special school districts to borrow money for building purposes and mortgage the school property of the district for payment of same.
2. Evidences of indebtedness to be in form as other instruments of like character given by individuals, etc.
3. Rights of such special school districts in law or equity.
4. Act in effect from passage; laws in conflict repealed.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That all special school districts in Arkansas are hereby authorized and empowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and to mortgage the real property of the district as security therefor, under such conditions and regulations as to time, amount, rate of interest and manner of payment as the board of school directors of said school district shall prescribe, and to renew and extend from time to time any evidences of indebtedness or mortgages, or both, issued or made by virtue hereof.

SECTION 2. The said evidences of indebtedness, whether warrants or promissory notes, or both, and mortgages, shall be in form in all respects as other instruments of like kind are required by law to be, and shall have the same force and effect as they would if executed by natural persons, and the warrants shall have the same validity as they would if there were money in the county treasury to pay the same at the time they were drawn, and may be drawn payable in the future, and need not be registered with the county (treasury) until the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date, as the building fund is provided and collected by successive levy and collection, and said special school districts shall be allowed in law or equity no defense merely by reason of the fact that it is a school district.

SECTION 3. Nothing in this act shall be so construed as to prevent or cut off from any such school districts any right in law or equity which a natural person might claim and assert in like circumstances, and in any action by or against said districts arising on any instrument or contract made under this act, the district shall, as far as practicable, be deemed and treated as natural persons.

SECTION 4. This act shall take effect and be in force from and after its passage. All laws and parts of laws in conflict herewith are hereby repealed. *Provided*, however, That Jefferson County is exempt.

(Filed in the office of the secretary of state by the governor, May 6, 1905, without his signature, the general assembly being adjourned.)"

At the 1903 session of the legislature, by Act 204, W. F. Kirby was appointed to revise and digest all of the laws of the state, of a general nature. The digester so appointed accepted the task and the result was Kirby's Digest of the Laws of Arkansas (1904). W. F. Kirby subsequently became a member of the Arkansas Supreme Court and served on that court for many years, and several of the important opinions of the court relating to

these special school districts, and their powers with respect to the borrowing of money, were written by Judge Kirby.[5]

Section 1 of Act 248, Acts of 1905, was amended by Act 25, Acts of 1913, by the addition of a clause specifically authorizing the refunding of indebtedness incurred under the authority of Act 248, Acts, 1905, and the issuance of new evidences of indebtedness and new mortgages therefor. In view of certain enactments between 1905 and 1911, and three important decisions of the Supreme Court

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[5]Act 85, Acts, 1903, contained five sections, the fifth section being merely the provision that the act should take effect from and after its passage. The first four sections appeared as Sections 7696 to 7699, inclusive, of Kirby's Digest (1904).

No further official digest of the laws of Arkansas was made until Crawford & Moses Digest of 1921. In the meantime, Act 248, Acts of 1905, had been adopted, and slightly amended in 1913 and 1917.

Act 248, Acts of 1905, contained four sections, the fourth section providing that it should be in force from and after its passage, containing a repealing clause, and exempting Jefferson County from its operation. The first three sections were a reenactment of the first three sections of Act 85, Acts of 1903.

Section 2 of Act 248, Acts of 1905, was amended by Act 160, Acts of 1917, by the addition of two provisos requiring that bonds issued under the authority of Act 248, Acts of 1905, should be sold upon competitive bidding, after advertisement and notice, and at not less than par.

Section 4 of Act 248, Acts of 1905, was likewise amended by Act 160, Acts of 1917, so as to omit the provision exempting Jefferson County from the operation of the act. The fact that Jefferson County had been specifically excluded from the benefits of Act 248, Acts of 1905, is relevant to the proper understanding of the *Schmutz* case, *supra*.

Section 3 of Act 248, Acts of 1905, was not amended, until its repeal by Act 169 of the Acts of 1931.

Sections 1, 2 and 3 of Act 248, Acts of 1905, appeared as Sections 8977, 8978 and 9010 of Crawford and Moses Digest (1921). Section 4 was not digested. Section 9010 of Crawford and Moses Digest (1921) contains an erroneous note that it was amended by the Act of March 1, 1917 (Act 160, Acts of 1917), but such is not the case.

of Arkansas, one in 1908 and two in 1912,[6] this addition, made by the 1913 legislature, to the powers conferred by Act 248, Act of 1905, is of much significance, as indicating the legislative concurrence with the construction which had been put upon Act 248, Acts of 1905, by the decisions of the Arkansas Supreme Court rendered during the intervening eight years.

The question was subsequently raised as to whether the re-enactment of Act, 85, Acts of 1903, by Act 248, Acts of 1905, so as to omit the requirement of an election, was in fact a repeal of Section 4 of Act 85, Acts of 1903, the section which required the prior authority of an election. The Supreme Court of Arkansas so held, in a decision coming down on October 7, 1912, in the case of *Milwee* v. *Board of Directors of Horatio Special School District*, 105 Ark. 77, 150 S. W. 391, in which the opinion was written by Judge Kirby. Milwee and others had brought the suit to enjoin the board of directors from borrowing money, on the ground that the question had not been submitted to a vote of the electors of the district. The chancellor found that they had such authority, under Act 248, Acts of 1905, and dismissed their bill for want of equity. The Supreme Court said:

> "It is contended for the reversal of the judgment, first, that the directors of the special school district

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[6]These three cases were:

Hampton v. *Hickey*, (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707.

Crow v. *Special School District No. 2*, (Feb. 19, 1912) 102 Ark. 401, 144 S. W. 226.

Milwee v. *Board of Directors of Horatio Special School District*, (Oct. 7, 1912) 105 Ark. 77, 150 S. W. 391.

The first case coming before the Supreme Court of Arkansas in which the problem was involved (but not Act 248, Acts of 1905) was the case of *Schmutz* v. *Special School District of Little Rock*, (March 3, 1906) 78 Ark. 118, 95 S. W. 438.

of the town of Horatio were without power to borrow money and mortgage the property of the district to secure the payment thereof for the erection of a school building, unless first authorized to do so by a majority vote of the electors of the district * * *. The Act of March 17, 1903 (Sections 7696-7699 of Kirby's Digest), authorized and empowered all special, free school districts in the state to borrow money to secure funds for the erection and equipment of necessary school buildings, and to mortgage the real property of the district as security therefor, but such authority could not be exercised until a majority of the electors of the district at an annual school election, at which the question was submitted, first voted in favor thereof; the legislature at the 1905 session by act No. 248 of May 6, 1905, re-enacted the first three sections of said Act of 1903, leaving off Section 4 thereof (Section 7699, Kirby's Digest), which required the submission of the question of borrowing money to the electors of the district at an annual school election and a majority vote in favor thereof before it could be done. This act expressly repeals all laws in conflict and exempts Jefferson County from its provisions. Does it repeal, by implication, said omitted section?"

Act 248, Acts of 1905, had previously been before that court, in the case of *Hampton* v. *Hickey*, (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707, in which that court had held that Act 248, Acts of 1905, superceded and was broader than any of the special acts passed at the same session of the legislature authorizing the borrowing of money by the boards of directors of special school districts. This case is of importance on the question of the power of the boards of directors to pledge the revenues and income of the districts, and is discussed more fully below. By necessary implication, the case of *Hampton* v. *Hickey*, *supra*, must have held that the boards of directors did not require the prior authority of an election, but, in the *Milwee Case*, *supra*, after mentioning the case of

Hampton v. *Hickey, supra*, the court undertook to set the matter at rest beyond any possible question, saying:

> "It is true the question here presented was not directly passed upon in said cause (*i. e., Hampton* v. *Hickey, supra*), but the whole subject was taken up by the legislature anew, and the later act covers the entire ground of the former statute, except the provision requiring the majority vote of the electors before the power could be exercised, omitted therefrom, and was evidently intended as a substitute for the former statute and said omitted section was thereby impliedly repealed. It follows that the board was authorized to borrow money without the submission of the question to the electors of the district."

The Supreme Court of Arkansas never receded from its decision in the *Milwee Case, supra*, so that until the adoption of Act 169, Acts of 1931, it was established and unquestioned law of the state that the boards of directors of urban special school districts could borrow money and issue bonds without the prior authority of an election.

It may be said that we have taken pains to demonstrate something that is admitted on all sides, and that nothing has yet been said to show that in addition to the power to borrow money without the prior authority of an election the board of directors of an urban special school district also had the power to pledge the revenues thereof, as and when received, for the payment of such bonds. We respectfully submit that the one cannot properly be demonstrated without the other.

The legislature of Arkansas and the Supreme Court of the state recognized over a period of many years that there were practical differences between the rural school districts, on the one hand, and the special school districts in incorporated cities and towns, on the other hand. In the case of *Crow* v. *Special School District No. 2*, 102 Ark. 401, 144 S. W. 226, decided February 19, 1912, there

is an extended and pointed discussion of this difference, in an opinion written by Judge Kirby. The court pointed out, among other things, that:

> "The legislature provided for the organization of such districts under different methods, and also different laws for the government thereof, the directors, within the single or special school districts in the cities and towns and the territory annexed thereto, being given greater power for the management and promotion of the school interests than those of the common school districts, whose powers are limited and dependent largely upon the will of the electors as expressed at the annual school meetings."

There could be no more direct statement of the greater powers of the directors of the urban special school districts, and that such powers were not "dependent largely upon the will of the electors as expressed at the annual school meetings" as expressly held six months later in the *Milwee Case, supra.* The Supreme Court of Arkansas, by Judge Kirby, also observed in the *Crow Case, supra,* that:

> "It soon became apparent that the cause of education flourished and better schools were established and maintained in the single school districts where the directors were given more power in the control and management of the schools, and where they had more means for their maintenance, because of the wealth of the territory, and different communities and localities, desiring to improve their school facilities, sought relief of the legislature in the enactment of divers special acts, creating single or special school districts out of territory that could not be included within such districts under the general law, and giving the directors thereof increased powers. To meet this insisted demand and avoid so much troublesome special legislation, the general law was made, authorizing the organization and establishment of rural special school districts."

The general law to which reference was there made was Act 321, Acts of 1909, page 947, as amended by Act 169, Acts, 1911, page 141. Act 321, Acts of 1909, consists of only four short sections. Section 2 authorizes the county judge to call the election for determination whether any given territory other than incorporated cities and towns shall be organized as a "single" school district. Section 4 is a repealing clause. Sections 1 and 3 are here set out in full.

> "Section 1. That when the people of any given territory in any county in this state, other than incorporated cities and towns, desire to avail themselves of the benefits of all laws of this state, for the regulation of public schools in incorporated cities and towns, they may be organized into and established as a single school district in the manner and with powers therein provided, with such modifications of said laws as are herein provided."
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> "Section 3. That all school districts created under this act shall have power to borrow money as any other special or single school district in cities or incorporated towns, when a majority of the legal electors vote for the same, at any annual school meeting."

The only "modifications of said laws" made by Act 321 were (1) the provisions whereby the county judge could call the necessary election for organization and (2) the last clause of Section 3, which restricted the power to borrow money, as an urban district could, to cases "where a majority of the legal electors vote for the same, at any annual school meeting."

Act 169, Acts of 1911, page 141, which amended and enlarged Act 321, Acts of 1909, consists of nine sections. The first six sections deal with the election of directors and the annual election. Section 7 specifically provides that "Rural special school districts

shall have the power to borrow money for the purposes and in the manner provided in Sections 7696, 7697 and 7698, of Kirby's Digest." The sections mentioned are the effective sections of Act 85, Acts, 1903, as re-enacted by Act 248, Acts, 1905. Section 7 of Act 169, Acts of 1911, then goes on to provide that:

> "In addition to such power, the board of directors shall have the power to borrow money for building purposes if authorized by a vote of a majority of the electors of the district at any annual election."

This Section 7 is lengthy, taking up almost three pages, and it is at once apparent that the first two sentences, above quoted, were not intended to be a construction by the legislature to the effect that urban special school districts under Act 248, Acts of 1905, had no power to borrow money except upon a vote of the electors. In any event, the contrary was specifically held by the Supreme Court of Arkansas, some eighteen months after the passage of Act 169, Acts of 1911, in the case of *Milwee* v. *Board of Directors of Horatio Special School District*, 105 Ark. 77, 150 S. W. 391, to which reference has already been made.[7]

It is apparent, upon a reading of Section 7, Act 169, Acts of 1911, that its purpose was to make definite and

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[7]The Supreme Court of Arkansas repeated that holding, in specific language, as late as 1926, saying, in the case of *Davis* v. *White*, 171 Ark. 385, 284 S. W. 764, that:

> "But Mammoth Spring Special School District No. 2 is not a rural special school district and did not derive its authority to issue bonds from Sec. 8837, C. & M. Digest. Sec. 8984, C. & M. Digest, is the section of the statute under which appellee school district proceeded, and this section does not require, as a condition precedent to the issuance of bonds, the consent of the electors (citing the *Milwee Case, supra*). In other words, the affirmative vote of the electors is not required to confer this authority on the urban special school districts of the state, which derive their authority to issue bonds under Sec. 8984, C. & M. Digest."

certain the meaning, purpose and function of a "building fund" in a rural special school district, maintained by a continuing levy, if authority for creation of such a fund was conferred by the electors in the first instance it may be thought that this is a legislative construction of Act 248, Acts of 1905, as not granting any power to the boards of directors of urban special school districts to create a "building fund." That may be so as to a building fund maintained by a continuing levy, but it does not follow that if no power existed under Act 248, Acts, 1905, to create a building fund maintained by a continuing levy, there was also no power thereunder to pledge the revenues of the district, as and when received, and to create a building fund out of such revenues.

In the case of *Crow* v. *Special School District No. 2*, 102 Ark. 401, 144 S. W. 226, the court, by Judge Kirby, discussed the provisions of Act 321, Acts of 1909, and Act 169, Acts of 1911, in some detail, and said:

> "The directors are given certain enlarged powers. They may borrow money as provided under the law for the government of single special school districts and may provide for a building fund, if authorized by the electors at the annual election * * *."

Section 7 itself contained the following proviso:

> "*Provided*, that, whether the vote be 'For Building Fund,' or 'Against Building Fund,' this shall not prevent the electors from voting for a building tax, as now provided by law."

We submit that the purpose and effect of the provisions of Section 7 of Act 169, Acts of 1911, was to provide a means by which a continuing levy could be voted by a rural special school district at the original election authorizing the borrowing of money, instead of leaving the obligations of the rural special school districts subject to the necessity of an affirmative vote at each an-

nual election, for the reason that the credit of the rural districts was not as good as that of the urban districts, where, as to the latter, the pledge of the revenue, as and when voted, levied and collected in each year was sufficient to enable them to borrow money on favorable terms, even without provision for a continuing levy.

In the opinion in the *Crow Case, supra*, after setting out in detail the provisions of Section 7 of Act 169, Acts of 1911, the court went on to say:

> "It is true this method of borrowing is not exclusive but it indicates the legislative intent. The necessity existed for the borrowing of money by the school districts of the state for the improvement and maintenance of its schools, and the legislature recognized it, and gave the authority to mortgage property of the district, and in effect pledge certain revenues thereof for the payment of the loan."

The gist of the decision of the circuit court of appeals, in this case, is found in the two following sentences (121 F. 2d 423, at p. 425):

> "We have held above that under the law of Arkansas, the bondholders never had a lien on the general tax revenues of the district, and so they could not have compelled the board of directors to make application of any part of such revenues to the payment of their bonds, as a matter of contract obligation. That which was not an enforceable contract right was not an obligation which could be impaired, within the meaning of the constitutional prohibition."

Earlier in that opinion the court had referred to its decision in the case of *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock*, 105 F. 2d 716 (hereinafter referred to as the "Foresters case"), saying that it had there held that:

> "* * * the authority of the board of directors of an urban special school district, under the statutes

involved, to issue bonds on behalf of the district without a vote of its electors, did not include the power to pledge the general tax revenues of the district, and that an attempt by the board to create a lien upon any part of such revenues was void."

In the *Foresters Case, supra*, the same court had said, after discussing certain statutes and the *Horne* and *Pledger* cases:[8]

> "It is noticeable that by none of these acts, constitutional or statutory, was any power conferred to pledge revenues. It is also observed that the constitutional provision is that the tax shall be voted in each year. So far as the law in force when these bonds were issued is concerned, it seems extremely doubtful whether the school district could do more than make an annual appropriation for building purposes through action of its electors."

We refer below to, and quote from, a considerable number of statutes which did specifically and in terms authorize the directors of urban special school districts to pledge the revenues of such districts. Likewise, we have presented in this brief a number of decisions of the Supreme Court of Arkansas, which we consider to be directly and indirectly in point upon the power of the directors of such districts to pledge the revenues, to which, both statutes and decisions, no reference appears in the opinion in the Foresters case, nor in the opinion of the circuit court of appeals in this case, nor in the briefs of the parties to this case, now before this Court. We respectfully submit that the Circuit Court of Appeals for the Eighth Circuit has given too much weight to the equivocal language of the *Horne* and *Pledger* opinions, without having before it the full facts and circum-

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[8]*Horne* v. *Paragould Special School District*, (Feb. 20, 1933) 186 Ark. 1000, 57 S. W. 2d 568.

Pledger v. *Cutrell*, (Oct. 15, 1934) 189 Ark. 562, 74 S. W. 2d 646, and 75 S. W. 2d 76.

stances upon which a decision on this fundamental and all important question should be reached, and that perhaps, and we say it with all respect, the decisions of the Supreme Court of Arkansas, in those two cases, might have resulted from a similar lack of historical and judicial background.[9]

We think it apparent that when the Supreme Court of Arkansas, on February 19, 1912, in that part of the opinion in the case of *Crow* v. *Special School District No. 2*, 102 Ark. 401, 144 S. W. 226, last above quoted, said that the continuing levy provided for by Section 7 of Act 169, Acts of 1911, was not exclusive, and that:

> "The necessity existed for the borrowing of money by the school districts of the state for the improvement and maintenance of its schools, and the legislature recognized it, and gave the authority to mortgage property of the district, and in effect pledge certain revenues thereof for payment of the loan."

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[9]We say this with all respect, and desire to point out that the Supreme Court of Arkansas has itself been entirely frank in such a situation. In the case of *Dickinson* v. *Housley*, 130 Ark. 259, 197 S. W. 25, it reversed, without mention, its decision upon a point of law made in the earlier case of *Brunson* v. *Board of Directors of Crawford County Levee District*, 107 Ark. 24, 153 S. W. 828, and, in the still later case of *Chicago, R. I. & Pac. Ry. Co.* v. *Brazil*, 166 Ark. 246, 266 S. W. 66, it frankly said:

> "Our attention is called to the case of *Dickinson* v. *Housley*, 130 Ark. 259, where, under very similar facts, we permitted the receiver of the appellant railroad company to recover taxes illegally levied. An examination of that case and of the briefs filed by counsel shows, however, that the question of duress was not there raised, and our decision and opinion covered only the points raised by counsel. Had this point been raised, or had it suggested itself to us in our consideration of the case, we would necessarily have held, upon the authority of *Brunson* v. *Board of Directors, supra*, that the payment was a voluntary one, and that the taxes paid could not be recovered on that account."

it had reference to the urban special school districts and the power they possessed under Act 248, Acts of 1905, to execute mortgages on their property "and in effect pledge certain revenues thereof for payment of the loan."

We submit there can be no other reasonable reference for this language. The court could scarcely have been talking about Section 7 of Act 169, Acts of 1911, which it had just mentioned in considerable detail, as that section provided for a continuing levy and specifically, not merely "in effect" pledged the revenues of the district, and, furthermore, the court was not at that point referring to the powers of the rural special school districts, authorized by Act 321, Acts of 1909, as amended by Act 169, Acts of 1911, but was referring to "the school districts of the state."

It is a matter of regret, of course, that no more specific pronouncement by the Supreme Court of Arkansas can be found. We think the reason the court in the *Crow Case, supra*, qualified its statement of the existence of the power to pledge the revenues by the words, "in effect," was because it was well understood on all sides that the board of directors of an urban special school district could not create a continuing levy, absent the prior authority of an election, and that the pledge was only and solely of the revenues as and when voted, levied and collected. We also think the reason no more specific holding to that effect can be found is because the existence of that limited power was so well understood in Arkansas, over such a long period of time, that it was never questioned until the decisions in the *Horne* and *Pledger* cases,[10] out of which the present state of this

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[10]*Horne* v. *Paragould Special School District*, 186 Ark. 1000, 57 S. W. 2d 568.

Pledger v. *Cutrell*, 189 Ark. 562, 74 S. W. 2d 646, and 75 S. W. 2d 76.

litigation resulted, by a more or less inevitable and unfortunate evolution. We also think, however, that an examination of the more or less contemporaneous acts of the Arkansas legislature, in 1905 and 1907, and of the earlier decisions of the Supreme Court of Arkansas, over and above the *Schmutz* case, will demonstrate that our opinion is not surmise or inference but is based upon matter having direct probative force.

We have pointed out above that the 1903 legislature, in addition to passing the general act of that year (Act. 85, Acts of 1903), also passed eleven special acts authorizing school districts to borrow money. These acts are tabulated in Footnote 4. No one of these acts specifically mentioned the pledge of the revenues, tax or otherwise. An examination of the acts adopted at the 1905 and 1907 sessions of the legislature, however, discloses a very different situation.

First to be mentioned was the adoption of Act 248, Acts of 1905, with a broader title, re-enacting Act 85, Acts of 1903, and omitting Section 4 of that act. This in itself is important and significant. Next we have the special acts passed at both the 1905 and 1907 sessions of the legislature.

The total legislative output of the 1905 legislature was 350 acts. Thirty-nine of those acts, in addition to Act 248, or over 10% of the entire legislative product of that session related to school districts, and we have here listed, for the convenience of the court, the entire 39 of such acts, to-wit:

#	Act 22, p. 74	* Corning Special School District
	Act 32, p. 107	Salem School District
	Act 39, p. 119	Mount Olive School District
	Act 40, p. 122	* Special School District No. 9, of Wynne, Cross County, Arkansas
	Act 46, p. 134	Special School District of Booneville, Arkansas

	Act 55, p. 154	*	Little Rock Special School District
	Act 64, p. 166		School District No. 43, Craighead County
	Act 67, p. 169	*	McCrory Special School District
	Act 68, p. 171	*	Piggott Special School District
	Act 70, p. 173	*	Craighead County, School District No. 21
#	Act 94, p. 220	*	Marianna Special School District
	Act 127, p. 323		Glendale School District
#	Act 135, p. 340	*	England Special School District
	Act 139, p. 347		Damascus School District
	Act 140, p. 351	*	Manilla Special School District
	Act 141, p. 353		Searcy School District
	Act 155, p. 396	*	Pine Bluff Special School District
	Act 167, p. 415		Boughton School District
#	Act 176, p. 462	*	DeQueen Special School District
	Act 182, p. 470		Mount Olive Special School District
	Act 186, p. 475		Kensett Special School District
	Act 190, p. 486	*	Lakeside School District
	Act 195, p. 503		Irons Point Special School District
#	Act 197, p. 507	*	Fordyce Special School District
	Act 205, p. 531	*	St. Joe Special School District
	Act 208, p. 535	*	Malvern Special School District
	Act 211, p. 539		Fulbax Special School District
	Act 223, p. 564		Star City Special School District
	Act 226, p. 574	*	Stuttgart Special School District No. 22
#	Act 230, p. 580	*	Harrisburg School District
	Act 258, p. 671	*	Hope Special School District
#	Act 267, p. 684	*	Mineral Springs Special School District
	Act 293, p. 721	*	Blytheville Special School District
	Act 297, p. 725	*	Biggers Special School District
	Act 301, p. 729	*	North Yellville Special School District
#	Act 314, p. 755	*	Success Special School District
#	Act 318, p. 760	*	Tuckerman Special School District
	Act 342, p. 801		Bodcaw School District
	Act 349, p. 810		Ledwidge Special School District

There were twenty-four of those acts which authorized the special school districts named to borrow money. Such acts are marked thus (*). There were nine of such acts which specifically authorized the pledge of all or

part of the revenues of the district to secure the repayment of the money borrowed. Those acts are marked thus (#).

The first of these special acts enacted at the 1905 session of the legislature was Act 22. The full title of this act is as follows:

> "AN ACT to organize the Corning Special School District in Clay County, Arkansas, and to authorize said district to borrow money and to mortgage its property."

The title of the act contained no mention of any authority to pledge the revenue of the district, or any part of it. The first section of Act 22 creates the district, the second section authorizes it to borrow money not to exceed $5,000, and to execute a mortgage on its real property, the third section specifies how the note or notes and mortgage shall be signed, and that they shall be in the usual form, and the fourth section reads as follows:

> "Section 4. From the revenue received by said district, the directors shall pay, first the interest on any loan, or loans, negotiated under the authority of this Act, and shall create and provide from the revenue for a sufficient sinking fund for the purpose of paying the indebtedness created under the authority of this Act, as the same shall become due and payable."

Act 94, Acts of 1905, page 220, authorized the board of directors of Marianna Special School District to borrow not to exceed $25,000, and to mortgage the property of the district. The last sentence of Section 1 of this act read as follows:

> "And said directors are further empowered to pledge or use one mill of the authorized levy of taxes annually of said district, for the purpose of paying or of creating a sinking fund for the payment of money borrowed, with interest, for building purposes."

Act 135, Acts of 1905, page 340, authorized the board of directors of England Special School District to borrow not to exceed $10,000 to mortgage the property of the district, and Section 1 thereof contained the following clause:

> "* * * and said directors are further empowered to pledge or use one mill or more of the authorized levy of taxes annually of said district for the purpose of paying off or creating a sinking fund for the payment of the money borrowed with interest, for building purposes herein provided."

It will be noted that this clause mentions one mill, but that the authority of the directors is specifically not limited to the pledge of one mill.

Act 176, Acts of 1905, page 462, authorized the board of directors of DeQueen Special School District to borrow money to build and equip a high school, in an amount not to exceed $15,000, to mortgage its real estate, and Section 1 of the act contained the following as the last sentence thereof:

> "And said board of directors is further empowered to pledge or use two mills of the levy of taxes annually of said district, for the purpose of paying or creating a sinking fund for the payment of the money borrowed, with interest, for the building and equipping the school building provided for."

The four acts above quoted from each provided that the mortgage should be "in form in all respects as are other instruments of like kind." It would seem that it was the common practice, at that time, to include in such mortgages a pledge of the revenues of the district. Act 22 contained no limitation upon that pledge. Acts 94, 135 and 176, instead of constituting some special authority, were, in fact, a limitation. The maximum rate, in 1905, was 5 mills, and one mill and two mills constituted respectively, 20% and 40% of the maximum levy.

Act 197, Acts of 1905, page 507, is of particular importance, as it was the act before the Arkansas Supreme Court in the case of *Hampton* v. *Hickey,* (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707. That case and Act 197 are discussed below, at the conclusion of the presentation of the relevant matter found in the various acts passed at the 1905 and 1907 sessions of the legislature, the latter session having been concluded prior to the decision in *Hampton* v. *Hickey, supra.*

Act 197, Acts of 1905, page 508, authorized the board of directors of the Fordyce Special School District to borrow not to exceed $15,000, to mortgage the property of the district, and the last sentence of Section 1 read as follows:

> "And said directors are further empowered to pledge or use one mill of the authorized levy of taxes annually of said district for the purpose of paying off or creating a sinking fund for the payment of the money borrowed, with interest, for building purposes herein provided."

Act 230, Acts of 1905, page 580, is a most detailed enactment. It creates a special school district, known as Harrisburg School District, and authorizes it to borrow money, not to exceed $15,000, provides for the registration of the bonds, for their callability after 20 years if a sinking fund therefor shall be created, directs how they shall be executed and delivered, for the keeping of a registry, and numerous other matters, including some that were probably beyond the power of the legislature. Strangely, this special act is silent on the matter of executing a mortgage, but its Section 13 reads as follows:

> "Section 13. That to the payment of both principal and interest of the bonds to be issued under the provisions of this act, the entire revenue of the district arising from the provision herein is by this act pledged, and the board of directors are hereby required to set apart annually a sufficient amount thereof to secure and pay the interest on said bonds."

Act 230 takes up almost eight printed pages and it may not be unreasonable to suppose that its length, as well as the large number of such special acts introduced and passed at that session of the legislature, influenced the passage of Act 248, Acts of 1905. In any event, the next act following Act 230, and appertaining to special school districts, is Act No. 248.

Act 267, Acts of 1905, page 684, authorized the board of directors of Mineral Springs Special School District to borrow money, limited to $10,000, the execution of a mortgage, and contained the following as the last sentence of Section 1:

> "And said board of directors is further empowered to pledge or use one mill of the levy of taxes annually of said district for the purpose of paying or of creating a sinking fund for the payment of the money borrowed, with interest, for building or equipment purposes, as herein provided."

Act 314, Acts of 1905, page 755, contains the same unlimited authority as was found in Act 22. Act 314 creates the Success Special School District, authorizes it to borrow money and mortgage its property, and provides in its Section 4 as follows:

> "Section 4. From the revenue received by said district, the directors shall pay, first the interest on any loan or loans negotiated under the authority of this act, and shall create and provide from the revenue for a sufficient sinking fund for the purpose of paying the indebtedness created under the authority of this act, as the same shall become due and payable."

Act 318, Acts of 1905, page 760, is equally significant. Section 1 creates the Tuckerman Special School District. Section 2 authorizes it to borrow money, not to exceed $5,000. Section 3 authorizes it to execute a promissory note therefor. Section 4 authorizes it to execute a mortgage upon the real property of the district to secure the note, and Section 5 reads as follows:

"Section 5. Said board of directors is further empowered and authorized to pledge or use such part of the levy of taxes annually of said district for the purpose of paying off said note or notes and the interest thereon, or for creating a sinking fund for such payment as may be necessary."

The decision in the case of *Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438, came down on March 3, 1906, between the 1905 and 1907 sessions of the legislature, but it is apparent from an examination of the 1907 acts that that decision created no doubt in the legislative mind as to its power to authorize the boards of directors of special school districts to borrow money, and, in addition to mortgaging the real property, to pledge the revenues of the district for the repayment thereof.

The Legislature of 1907 devoted no small part of its work to special school districts. A total of sixty-nine special acts either creating special school districts or authorizing them to borrow money, or both, were adopted at that session. Forty-five of these special acts authorized the borrowing of money and eighteen of them contained specific authority for the pledge of all or part of the revenues of the district. In passing, it should be noted that a total of 460 acts were adopted at the 1907 session of the legislature and that the sixty-nine acts affecting special school districts represent approximately 15% of the work of that session. A tabulation of these sixty-nine acts affecting special school districts is here set out as follows:

	Act 2, p. 3	Humphrey Special School District
	Act 9, p. 11	Siloam Springs, School District of
	Act 14, p. 17	* Lakeside School District of Chicot County.
#	Act 20, p. 24	* Jonesboro Special School District
	Act 27, p. 35	* Charleston Special School District

	Act 35, p. 80	*	Rector, Special School District No. 46 of
#	Act 49, p. 120	*	Kibler Special School District
#	Act 50, p. 122	*	Datto Special School District No. 71
	Act 57, p. 136	*	Prairie Grove, Special School District of
	Act 60, p. 141	*	Dermott School District
	Act 67, p. 156	*	Rogers, Special School District of
	Act 75, p. 169	*	Altus, Special School District No. 31 of
#	Act 86, p. 189	*	Monticello School District
	Act 88, p. 193		Higginson Special School District
	Act 93, p. 212	*	Cotter Special School District No. 60
#	Act 97, p. 218	*	Arkadelphia Special School District No. 1
	Act 98, p. 222		Columbus, School District of
	Act 108, p. 272		Evening Shade School District
#	Act 114, p. 291	*	Ola Special School District
	Act 127, p. 318	*	Reyno Special School District
	Act 138, p. 330	*	Springdale Special School District
	Act 163, p. 396	*	Howell, School District No. 21 of
	Act 164, p. 397		Arnold School District
#	Act 173, p. 412	*	Washington Special School District
	Act 174, p. 418	*	Osceola, Special School District of
	Act 180, p. 425		Center Point Special School District
#	Act 187, p. 439	*	Bethseda School District
#	Act 188, p. 441	*	Jacksonville, Special School District of
#	Act 191, p. 448	*	Jasper Special School District
#	Act 192, p. 450	*	Paragould, Special School District of
	Act 211, p. 494		Faulkner School District
	Act 213, p. 497		West Hartford Special School District
	Act 215, p. 511	*	DeWitt Special School District
#	Act 216, p. 513	*	Wilmot Special School District
	Act 217, p. 515		Cato School District
	Act 227, p. 630		Humphrey, School District of
	Act 234, p. 548	*	Lewisville Special School District
	Act 242, p. 561	*	Wolcott Special School District
	Act 244, p. 564	*	Thornton Special School District
	Act 248, p. 586		Ouachita County, Special School District in

	Act 249, p. 587		Columbus, School District of
#	Act 259, p. 603	*	Dover Special School District
	Act 262, p. 609		Izard-Sharp School District
	Act 265, p. 613		Knoxville Special School District
	Act 279, p. 650	*	Plain View Special School District
	Act 285, p. 677	*	Carthage, Special School District of
#	Act 289, p. 684	*	Brown Springs Special School District
	Act 299, p. 723	*	El Dorado, Special School District of
#	Act 318, p. 769	*	Portland, Special School District of
	Act 326, p. 799		McGehee School District, The
	Act 327, p. 801		Springdale, School District of
	Act 335, p. 816	*	Columbus, School District of
	Act 339, p. 823		Dierks Special School District
	Act 349, p. 837	*	Humphrey Special School District
	Act 361, p. 858		Tinsman Special School District
	Act 364, p. 862	*	Leslie Special School District
	Act 366, p. 886		Mt. Ida School District
#	Act 371, p. 932	*	Leola Special School District
#	Act 376, p. 949	*	Success Special School District
	Act 380, p. 960	*	Warren, School District of
	Act 381, p. 961		Choctaw School District
	Act 382, p. 962	*	Hermitage Special School District
#	Act 392, p. 981	*	Piggott Special School District
	Act 435, p. 1165		Owen Township School District
	Act 437, p. 1168		Greene County, Special School District of
	Act 449, p. 1223	*	Hoxie School District
	Act 450, p. 1224		Huntsville Special School District
	Act 457, p. 1233	*	Baxter County, School District No. 61 of
	Act 458, p. 1235	*	Jackman Special School District

The forty-five of those acts which authorized the named school districts to borrow money are marked thus (*). The eighteen of those acts which specifically authorized the pledge of all or part of the revenues of the district to secure the repayment of the money borrowed are marked thus (#). We consider it would unduly extend this brief and serve no useful purpose to set out

here, as was done with the similar acts of 1905, the exact language of the eighteen acts which specifically authorized the pledging of all or part of the revenues of the named districts. The language of the 1907 acts is much the same, with incidental variations, as the language used in the 1905 acts, and we respectfully refer the court to the eighteen acts of the 1907 legislature which are thus (#) marked. Suffice it to point out that while the 1905 legislature had adopted nine of such acts the 1907 legislature, in the face of the decision in the *Schmutz Case*, *supra*, doubled that number and adopted eighteen of such acts.

In the case of *Hampton* v. *Hickey*, 88 Ark. 324, 114 S. W. 707, decided by the Supreme Court of Arkansas on December 7, 1908, with the legislative product of both the 1905 and 1907 legislatures before it, a taxpayer sought to enjoin the Fordyce special school district from issuing bonds to the amount of $25,000 to secure funds to build two school houses. The gravamen of the action was that the district was limited to an indebtedness of $15,000 for that purpose by virtue of the provisions of a special act approved April 26, 1905 (Act 197, p. 507). The court held that the general act of May 6, 1905 (Act 248 of 1905), repealed the former act of April 26, 1905, and upheld the issuance of the $25,000 of bonds. The statement of facts, and the opinion, are, however, highly significant.

In the statement of facts the court summarizes part of the answer of the defendant district as follows:

> "They (the directors of the district) deny that the school district is authorized to borrow only $15,000, but say that at the time the special act described in the complaint was passed the school board could borrow money and mortgage the property of the district only after the submission of the question to the electors of the district at an annual school election, and that the object of the special act was to

enable the school directors of this district to issue bonds and execute a mortgage without such election; but, after said special act was passed, the legislature passed an act applicable to all special school districts, authorizing the board of directors of such special school districts to borrow money and mortgage the real property of the district without submitting the question to the electors and leaving the amount to be borrowed to the discretion of the board."

With respect to Act 248, Acts of 1905, the court said:

"The general statute by its title is 'an act to permit any special school district in the State of Arkansas to borrow money for building purposes,' etc. Section 1 provides 'that all special school districts are hereby authorized and empowered,' etc. The words used 'any and all,' evidence the intention of the legislature to create a uniform system to operate on all special school districts alike. At former sessions of the legislature, special acts had been passed enabling the special school districts named in the act to borrow money to build a schoolhouse. A great number of these special acts were introduced, and some passed at the 1905 session. Then the general act was passed. It is broader in its scope than any of the special acts. It covers the whole subject matter embraced by them, and the objects designed to be effected are the same."

One of the principal "objects designed to be effected" by these special acts was the borrowing of money by these urban special school districts without the authority of an election. Subsequently, in the case of *Milwee* v. *Board of Directors of Horatio Special School District*, (Oct. 7, 1912) 105 Ark. 77, 150 S. W. 391, the Arkansas Supreme Court held, in terms, that the general act of 1905 had accomplished that object.

One of the "objects designed to be effected' by Act 197, Acts of 1905, authorizing Fordyce special school district to borrow money, was to give it the power to pledge one mill of its annual tax revenue (Section 1, Act 197).

In the case of the Fordyce special school district, we submit that it is not reasonable to suppose that the Supreme Court of Arkansas, in holding that the district was not limited to $15,000 in bonds, nevertheless, was holding at one and the same time that the Fordyce Special School District was without authority to pledge even one mill of its revenues. Other of the 1905 acts contained no such limitation, either in mills or percentages. The general act (Act. 248, Acts, 1905) was held to be "broader in its scope than any of the special acts," and we respectfully submit that the court must have held that the general act not only removed the limitation to the one mill contained in the Fordyce act, but that the general act included and carried with it the power to pledge the revenues, without limit.

The legislature met again the following year, in 1909, and adopted Act 321, Acts of 1909, which is discussed in the earlier part of this brief at some length. The decision in the case of *Hampton* v. *Hickey*, *supra*, was before the legislature at the 1909 session. If the meaning and effect of the decision in that case had not been in accord with the intention of the legislature and with the desired scope and effect of Act 248, Acts of 1905, there was no more appropriate time for the legislature to have remedied the situation. It did not do so. On the contrary it passed an act authorizing the creation of rural special school districts and extending to such districts all of the benefits of the urban special school districts, except that the latter were required to have the prior authority of an election in order to borrow money.

We are now brought to the case of *Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438, which was decided on March 3, 1906, and to the equivocal language of that opinion upon which the respondents rely. That case involved Act 55, Acts of 1905, which contains a Section 2 that may appear to be identical with Section

2 of Act 248, Acts of 1905, but, in fact, is not identical therewith. Section 2 of Act 248, fairly read, only required that the evidences of indebtedness should be drawn upon the "building fund" when warrants were issued, and did not require that notes (*i. e.*, bonds) when issued to evidence the indebtedness should be drawn upon the building fund.

The corresponding provisions of Section 2 of Acts 55 and 248, showing this difference, are set out below in parallel columns:

Act 55.	Act 248.
"Sec. 2. Said evidences of indebtedness, whether warrants or promissory notes, * * * shall be drawn upon the building fund * * *."	"Sec. 2. The said evidences of indebtedness, whether warrants or promissory notes, or both, and mortgages, shall be in form in all respects as other instruments of like kind are required by law to be, * * * and the warrants * * * shall be drawn upon the building fund * * *."

Reference to Act 185, Acts of 1903, for example, will show that this distinction was understood at that time by the legislature, and in Act 86, Acts of 1907, the equivalent of Section 2 of Act 248, Acts of 1905, was divided into three separate sections. In addition, we wish to call attention to the fact that Act 155, Acts of 1905, had a Section 2 which was, in fact, identical with Section 2 of Act 55, and not identical with Section 2 of Act 248, and that no other of the special acts passed at the 1905 session had a similar section. The significance of this is that Act 55 was the act authorizing the Special School District of Little Rock to borrow money and Act 155 was the act au-

thorizing the Special School District of Pine Bluff to borrow money. There was the further fact that Act 248, Acts of 1905, specifically excluded Jefferson County from its operation, and Jefferson County was the county of which Pine Bluff was the county seat. Little Rock and Pine Bluff were two of the largest cities in the state, and the court may well have considered that the difference in language between these acts was not a *lapsus linguae* on the part of the legislature, but was intended, in some way, to restrict the directors of such districts in the security which they might offer, by requiring that their obligations should be drawn upon the building fund. The decision in *Hampton* v. *Hickey*, *supra*, was still more than a year away, and there was yet no decision that Act 248, Acts of 1905, was broader than any of the special acts. It is a reasonable assumption that if the order of decision of the cases of *Hampton* v. *Hickey* and the *Schmutz* case had been reversed, the opinion in the *Schmutz* case would have contained no such equivocal language.

That which was troubling the court in the *Schmutz Case, supra,* was the question whether the peculiar wording of Section 2 of Act 55 (Little Rock), found only in one other of these numerous special acts of the 1905 legislature (Act 155), requiring that notes, as well as warrants, be drawn upon the building fund, was intended to be a restriction upon the general power to pledge the revenues. When the Arkansas court said that "this in effect pledges the building fund of the district whatever that may be" it was not expressing any doubt or uncertainty as to what the building fund was. Its doubt was whether the building fund could be construed to be made up of the entire revenues, in view of the restricted language of Section 2 of Act 55. This would seem to be clear because of the use of the words, "in that way," appearing in the second sentence follow-

ing. The court said, "But if we concede that the directors had no authority to pledge the revenues of the district in that way." What did it mean by "in that way?" Under the other acts (including Act 248 if notes (and not warrants) were issued), the court had no doubt that the directors could pledge all of the revenues, as and when received. The problem the court was facing was the question whether the directors could pledge all the revenues when they were limited, by the peculiar language of Act 55 to making even notes payable out of the building fund.

We have examined the record in the instant case, and find that the deed of trust for the 1926 bonds contains a covenant or representation that the district has created a "building fund" (R. 17). The deed of trust for the 1931 bonds contains a similar covenant or representation (R. 43). Section 2 of Act 248, however, did not require that these bonds be "drawn upon the building fund," as these bonds are not "warrants," and there is nothing in either deed of trust, or in the bonds of either issue, that limits their payment to the "building fund." On the contrary, there are specific pledges of all of the revenue of the district, both in the bonds (R. 11, 38) and in the deeds of trust (R. 7-8, 18 and R. 34, 44). This would appear to be entirely in accord with the law of the state, as expressed by the Supreme Court of Arkansas as recently as 1931, where in the case of *American Exchange Trust Company* v. *Truman Special School District*, 183 Ark. 1041, 40 S. W. 2d 770, where it said that there was no doubt but that the board of directors could provide a building fund (meaning, we think, out of the revenues as and when received, and not one maintained by a continuing levy), but that "the statute does not require that it shall be done, except when warrants payable in the future are issued as evidences of indebtedness for the money borrowed."

The district court so found in this case, in its decree of June 28, 1938, the pertinent language of its findings and conclusions of law being (R. 76-77):

> "* * * that it was contemplated and agreed that the bonded debt of the district should be paid out of its future tax revenues in the manner provided for in said respective deeds of trust and that said pledge of revenues to secure the payment of said bonds is a prior and superior lien to all other liens or debts of the district and all bonds of the district as to said revenues stand upon a parity, one with the other and should share in said revenues upon a pro rata basis.
>
> "Wherefore: 1. The court declares the law to be that it has jurisdiction of the parties and the subject matter of this suit; that the plaintiff and intervenors have a prior lien on the real estate described in the respective mortgages or deeds of trust and all revenues of the district from whatever sources derived.
>
> "2. That at the time of the execution of said respective deeds of trust and the issuance of said bonds the district was duly authorized and empowered to borrow money and mortgage the real property of the district and pledge its future revenues to secure the payment thereof."

Significantly, the above findings and conclusions of law were made subsequently to the decisions in the cases of *Horne* v. *Paragould Special School District*, (February 20, 1933) 186 Ark. 1000, 57 S. W. 2d 568, and *Pledger* v. *Cutrell*, (October 15, 1934) 189 Ark. 562, 75 S. W. 2d 76, so it would seem apparent that at the time of the decree of June 28, 1938, the district court did not consider that those cases were, or could be, controlling. The decree appealed from, of June 17, 1940, was made subsequently to the opinion of the Circuit Court of Appeals in the case of *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock*, (July 27, 1939) 105 F. 2d 716, so that it seems to us that it is the federal courts, and not the state court, that must be

deemed to have failed to follow the established law of the state respecting the power of the boards of directors to pledge the revenues.

Point II. Amendment No. 11 Did Not Affect or Restrict the Existing Power under Act 248, Acts of 1905, to Pledge the Revenues of the District.

Section 3 of Article XIV of the Constitution, as in effect from 1874 to 1926, authorized the millage levy "for school purposes." Amendment No. 11, in addition to increasing the limit that could be levied, substituted for those words the words "for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness for buildings." This change might be thought to have been designed to come within the language of the Supreme Court of Arkansas in the case of *School District of Hartford* v. *West Hartford Special School District*, 102 Ark. 261, 143 S. W. 895, where the court said:

> "Evidently, then, the section of the constitution in question did not intend to place any restriction on the use of school funds, other than that they should be used for school purposes. If it had appropriate language to effectuate that intent would have been used. If the framers of the constitution did not divide the school fund into separate classes, but, on the contrary, did provide a maximum rate which might be levied for all school purposes, how can it be said that such fund is appropriated to another purpose when it is designated and intended to be used for any of the purposes for which it might be levied?"

In other words, it might be argued that this change, within the language of the opinion in the *School District of Hartford Case, supra*, "means that a tax voted for

building purposes shall not be appropriated for any other purpose than that for erecting a schoolhouse," and that, as a result of Amendment No. 11, a tax voted for any one of the three enumerated purposes could not be used for either of the other two named purposes. As a matter of fact, it would appear that that is what the Arkansas Supreme Court actually held in the cases of *Horne* v. *Paragould Special School District No. 1*, 168 Ark. 1000, 57 S. W. 2d 568, and *Pledger* v. *Cutrell*, 189 Ark. 562, 75 S. W. 2d 76.

Amendment No. 11, on its face, however, did not accomplish such a result as the court found in the *Horne* and *Pledger* cases. In the *School District of Hartford Case*, *supra*, the Arkansas court said:

> "The section of the constitution in question provides that the general assembly may by general laws authorize school districts to levy by a vote of the qualified electors of such district a tax not to exceed a certain rate. This is for all school purposes and the particular rate which can be levied or used for the purpose of constructing schoolhouses in the several districts is not designated."

The change in language (as well as rate) made by Amendment No. 11 did not designate the particular rate which could be levied for any one or more of the enumerated purposes. In the absence of such a designation it would seem that Amendment No. 11, on its face, did not serve to diminish or lessen the powers of the special school districts existing prior to 1926, and thereafter until 1931, to pledge the tax revenues of the districts. Consequently, we respectfully submit that prior to the decisions in the *Horne* and *Pledger* cases it was well understood that Amendment No. 11 did not serve to put it in the hands of the electors to defeat the pledge of the tax revenues, for

the payment of interest as well as principal, if any tax was to be voted, by voting a tax for one or two of the specified purposes, and failing or refusing to vote a tax for "the retirement of existing indebtedness on buildings." Payment of interest is not retirement of indebtedness.

This seemingly clear construction of Amendment No. 11 appears necessarily to be confirmed by the enabling act passed at the 1927 session of the legislature (Act 63). Act 63, Acts, 1907, p. 177, is as brief as possible, consisting of two sections, Section 2 being a repealing clause, and, after reciting the amendment, Section 1, in full, reads as follows:

> "Section 1. That the qualified electors of the school districts at an annual school election may, in accordance with election procedure provided for by law, levy any rate of school tax they may desire. Provided that no rate voted shall exceed eighteen mills on the dollar."

It is likewise confirmed by the opinion of the Arkansas Supreme Court on May 4, 1931, in the case of *American Exchange Trust Co.* v. *Truman Special School District*, 183 Ark. 1041, 40 S. W. 2d 770. At that time, five years after the adoption of Amendment No. 11, the Arkansas court referred to the *Schmutz* case by name, and repeated the finding of the opinion in the *Schmutz* case that "it was evidently the intention of the legislature (in enacting Act 248 of 1905) that they (bonds issued under the authority of Act 248 of 1905) should be paid out of the revenues of the district 'and are therefore a charge against such revenues.' "

CONCLUSION.

We think the apparent legislative confusion in 1905 and 1907 over the necessity of an election and the power to pledge the tax revenues, as and when received, was clearly resolved by the decisions of the Supreme Court of Arkansas between 1905 and 1912, being, in particular, the cases of *Schmutz* v. *Special School District of Little Rock*, (March 3, 1906) 78 Ark. 118, 95 S. W. 438; *Hampton* v. *Hickey*, (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707; *Crow* v. *Special School District No. 2*, (Feb. 19, 1912) 102 Ark. 401, 144 S. W. 226, and *Milwee* v. *Board of Directors of Horatio Special School District*, (Oct. 7, 1912) 105 Ark. 77, 150 S. W. 391; that the apparent hesitancy of the *Schmutz* case is not real; that the existence of the questioned power was clearly confirmed by the legislative enactments in 1913 and thereafter, and by the decisions of the Arkansas Supreme Court rendered thereafter and up to and including the year 1931.

We respectfully submit that there has been an impairment of a valid and subsisting contractual obligation, carried by the bonds involved in this case and that the petition for certiorari herein should be granted, and that the judgment and decree appealed from should be reversed.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
Counsel for Martin-Holloway-Purcell, As Amicus Curiae.

ROBERT B. FIZZELL,
JOHN F. RHODES,
Of Counsel.

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In the
Supreme Court of the United States

OCTOBER TERM, 1941

No. 354

GEORGE E. MORTON, Trustee, and
CITY NATIONAL BANK, Trustee
and Individually ..... PETITIONERS

vs.

DARDANELLE SPECIAL SCHOOL DISTRICT NO. 15, YELL COUNTY,
ARKANSAS ..... RESPONDENT

PETITION FOR REHEARING

As a preface to the reasons supporting a rehearing and granting of the writ we wish to make the following suggestion:

In cases involving the impairment of contracts by state legislative action this Court determines for itself whether there is a contract and whether said contract has been impaired. In *Tidal Oil Co. vs. Flannagan*, 263 U. S., 444, this Court says:

> "There is another class of cases relied on to maintain this writ of error. They are those in which this Court has held that, in determining whether a state law has impaired a contract, it must decide for itself whether there was a contract, and whether the law, as enforced by the State Court, impairs it."

Hence any decision by the Supreme Court of Arkansas that the bond contract was not impaired is not binding upon this Court. Therefore since the undisputed evidence shows that under the Horne case and because of the power given to the electors after these bonds were sold it is clear that the bonds will never be paid. It is therefore a duty resting upon this Court to grant the writ of certiorari to prevent the confiscation of petitioners' property in the bonds.

This Court in a leading case on the subject makes it clear that this Court is bound to take jurisdiction of cases involving the confiscation of property. The Constitutional obligation resting upon this Court in a case of this kind is illustrated by the decision of this Court in the case of *Cohen vs. Virginia*, 6 Wheat., 404; 5 L. E., 291.

Therefore when there is presented to this Court a plain violation of petitioners' rights under said contract clause and under the Fourteenth Amendment we respectfully urge that an obligation rests upon this Court to protect petitioners' rights under said Constitution and to prevent the Legislature of a State from annulling said clause by legislative action. The judicial power vested in this Court owes a duty to the people of the United States to protect the destruction of said Constitution as against legislative acts which impair contracts.

Therefore, come now the above-named George E. Morton, Trustee, and City National Bank, Trustee, and individually, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

I

BASIC ERRORS IN THE OPINION OF THE COURT OF APPEALS OF THE EIGHTH CIRCUIT

This effort to have this Court review the decision of the Court of Appeals of the Eighth Circuit presents a most unusual situation for determination by this Court.

1. The Court of Appeals, as shown by its opinion elsewhere cited, bases its decision in the instant case upon the case of *Women's Catholic Order of Foresters vs. Spe-*

cial School District of North Little Rock, 105 Fed. (2d), 716. An examination of that case by this Court will demonstrate that error. The questions involved here were not at all involved in that case. The Court of Appeals in that case, showing that that case does not apply to the instant case, said:

> "The instant case involves a construction of the statutes of Arkansas as applied to Arkansas contracts. The jurisdiction of the Federal Court was invoked on the ground of diversity of citizenship, and there was no allegation or claim that either of the legislative acts involved nor the Constitution of Arkansas impaired the obligation of the contract, in violation of the restraints of the Federal Constitution."

The denial of this petition for a rehearing and the denial of the petition for writ of certiorari would be an affirmance of the opinion in the instant case based upon a prior opinion of said Court of Appeals, which does not decide any question in this case.

2. Another error in the opinion of the Court of Appeals, as respondent construes that opinion, is that said Court in the instant case denied the writ of certiorari on the decision of this Court in *Erie Railroad Co. vs. Tompkins*, 304 U. S., 64. We prove below that that too is an error. We show below that the decision of this Court in the Erie case is an authority showing that the Court of Appeals was bound to accept the decisions of the Supreme Court of Arkansas as to the powers of the board of directors in the Schmutz and Trumann cases, elsewhere discussed.

3. We have quoted below from the Schmutz case and from the brief of respondent in this Court in the instant case what is said about "later decisions" of the Arkansas Court. We have contended in our briefs, and do now contend, that the only "later decisions" are those in the Horne and Pledger cases. The respondent does not anywhere, as we understand its brief, contend that these later decisions are not based upon Act 169 of 1931 and Act 28 of 1933. It follows therefore that the "later decisions" are the decisions based upon said Acts of 1931 and 1933. There is no denial, as we understand respondent's

brief, that these Acts repealing all the laws governing the issue of these bonds and authorizing the electors to defeat payment, are in conflict with the law as it stood at the time of the issuance and delivery of these bonds. It is clear from the Acts themselves that said Acts 169 and 28 give powers to the electors which powers did not exist in the electors prior to those Acts, and therefore it seems to us certain that said Acts are in conflict with the rights of the petitioners in this case. The respondent does not, as we believe, anywhere deny the existence of such conflict between said Acts and the laws existing at the time of the issuance of these bonds.

We have mentioned this subject below and there is probably some repetition, but we deem it essential to clarification to make this suggestion here.

4. As hereinafter shown, the Court of Appeals erred in holding that there was no enforceable contract.

II

THE ACTS OF THE GENERAL ASSEMBLY OF ARKANSAS, BEING ACT 169 OF 1931 (ACTS 1931, PAGE 476) AND ACT 28 OF THE EXTRAORDINARY SESSION OF 1933 (ACTS 1933, PAGE 88), AS A MATTER OF LAW, IMPAIR THE OBLIGATIONS OF THE CONTRACT IN THE BONDS IN CONTROVERSY, SAID OBLIGATIONS BEING TO PROVIDE FOR REPAYMENT AND TO REPAY THE BORROWED MONEY.

It is the petitioners' contention that the obligation to repay the borrowed money is the principal and most substantial obligation in said contract in said bonds. If that obligation is impaired by the said Acts of the Legislature of Arkansas, then said Acts, under the established rule of law always in force in this Court, are void as applied to said obligation. Section 10 of Article I of the Constitution of the United States prohibits any State from passing any law impairing the obligation of contracts.

The Court of Appeals in its opinion on the instant case (*Morton, Trustee, et al. vs. Dardanelle Special School District*, 121 Fed. (2d), 423) declares in substance

that under the laws of Arkansas in existence at the time of the issuance of these bonds, there was no power in the board of directors to pledge the revenues for the repayment of the money borrowed. It is our contention that that declaration of law by that Court is clearly erroneous and unsupported by the decisions and statutes of Arkansas, as well as by the decisions of this Court. The bonds (R. 10, 36) assert on their face that the revenues derived from all sources are pledged to secure the payment of the bonds. The deed of trust contains recitals (R. 9, 35) showing the amount of the building fund which is set apart for use in payment of the interest and the bonds as they fall due each year. There are two bond issues involved: One was issued in 1926 and the other in 1931. The first was in the amount of $55,000.00 and the second in the amount of $105,000.00. The first issue bears interest at the rate of 5 per cent. per annum and the second issue bears interest at the rate of 5½ per cent. per annum. The bonds fall due serially and cover the period from their date to the year 1951. The district at the time of the issuance of the second bonds was indebted for past due indebtedness for constructing buildings in a sum approximating $35,000.00. The second bonds were issued to raise funds to pay that debt and, also, to construct a high school building. The said district had recently been increased from a small district to a very large one, being something like twenty-four miles in length and from six to nine miles in width, and covering the very fertile valley of the Arkansas river, and including the town of Dardanelle and a number of villages.

A taxpayer's suit was brought alleging that the bonds were illegal and void. As to the first issue, the validity was determined by the District Court without delay. As to the second issue, their validity was not finally determined until June 28, 1938 (see final decree, findings of fact and conclusions of law, R. 60-80).

The petitioners further contend that even if there was no power in the board of directors to pledge the revenues from whatever source derived, still the Acts of the Arkansas Legislature numbered 169 of 1931 and 28 of 1933 are

void as against these bond issues, for the reason that said Acts as construed by the Supreme Court of Arkansas impair the obligation of said contract.

III

THE STATUTES ABOVE REFERRED TO OF 1931 AND 1933, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS IN THE CASE OF *HORNE VS. PARAGOULD SPECIAL SCHOOL DISTRICT*, 186 ARK., 1000, 57 S. W. (2d) 568, AND ALSO IN THE CASE OF *PLEDGER VS. CUTTRELL*, 189 ARK. 562, 74 S. W. (2d) 646, IMPAIR THE OBLIGATION OF THE CONTRACT IN THE BOND.

The Court of Appeals denied this contention apparently on the ground that there was no enforceable contract in the bond. That declaration referred specifically to the lack of power, as that Court held, in the directors to pledge the revenues. It is our contention that the statutes authorizing the issuance of the bonds, being Act 248 of 1905 (Acts 1905, page 651), and Act 25 of 1913 (Acts 1913, page 115), and Act 160 of 1917 (Acts 1917, page 857), themselves pledged the revenues of special school districts from whatever source derived as security to repay the borrowed money. We contend that the Supreme Court of Arkansas in the case of *Schmutz vs. Special School District of Little Rock*, 78 Ark. 1118, 95 S. W. 438, declared and held that the Acts authorizing the issuance of these bonds as a matter of law pledged the revenues from whatever source derived. We respectfully submit that the respondent in its brief so admits on page 9. In said brief on this subject appears this language of the Supreme Court of Arkansas in the Schmutz case:

> " * * * The Act under which the bonds were issued provides that the evidence of indebtedness issued by the district shall be 'paid out of the building fund in the order of their date, as the building fund is provided and collected by successive levies.' This, in effect, pledges the building fund of the district, whatever that may be, to the payment of the bonds. Besides, as the bonds are valid obligations, it was evidently the intention of the Legislature that they

> should be paid out of the revenues of the district, and they are therefore a charge against such revenues as any other valid debts would be. * * * "

However, the respondent after quoting that language attempts to change its meaning by suggesting later decisions, and uses this language:

> "This seemed to carry the power to pledge revenue, but if we examine the wording in the light of later decisions it is not as positive as it first appears to be. We note, upon re-examination, the phrase 'This, in effect, pledges the building fund of the district, whatever that may be, to the payment of the bonds.' The opinion did not say that the directors could pledge the revenues of the district but that the statute in effect pledged the building fund, and the Court expressly states that there is uncertainty as to what a building fund may be."

After the decision of the Supreme Court of Arkansas in the Schmutz case, substantially every special school district in Arkansas began the issuance of bonds pledging the revenues and income from whatever source derived. Said bond issues, as we show in our brief on petition for certiorari, exceed twenty-three million dollars (our brief, p. 24). Respondent attempted to weaken our suggestion in that respect by contending that the great majority of these bonds had been refunded. That suggestion does not change the law nor the meaning of the decision in the Schmutz case. It is our contention that the Horne case is a suggestion to the voters in the special school districts of Arkansas of a method by which said voters may compel the refunding of bonds at a great loss to the bond owners. We believe that the honest voters of the State would vote an eighteen-mill tax, even though the whole of it was needed for a brief period to pay the debts as well as to operate the schools.

If the above statement from the brief of respondent is not sufficient to prove an admission by the respondent that the Acts authorizing the bonds themselves pledged the revenues, we still insist that the decisions of the Arkansas Supreme Court in the Schmutz case and, also, in the case of *American Exchange Trust Co. vs. Trumann*

Special School District, 183 Ark. 1041, 40 S. W. (2d) 770, do establish the contention that the board of directors had undoubted power to pledge the revenues. They had that power for the reason that the Schmutz and Trumann cases established the principle that the *statute* pledged the revenues from whatever source derived. If we are correct in that contention, then it would follow that the Court of Appeals was in error in saying that there was no power in the board of directors to pledge the revenues. Since the statute itself pledges the revenues, undoubtedly the power existed in the board of directors to comply with the requirements of the statute, and therefore they had the power under the statute to pledge the revenues as the statute itself did.

In our opinion, the above contentions have not been answered by the respondent and are not answered at all by the decision of the Court of Appeals. If the Court of Appeals is in error as to the power of the board of directors to pledge the revenues, it would follow as a matter of law that the petition for rehearing should be granted, and the petition for writ of certiorari should be granted, because of the errors of the Court of Appeals.

But the respondent attempts to contend that the Schmutz case, in view of later decisions, did not mean to say that the statutes themselves pledged the revenues. See our suggestion on this subject, supra. In truth, there is an unanswerable reason which shows that the statutes themselves did pledge the revenues. That reason is that the special school district had no means of paying these bonds except from its revenues derived from many different sources. But respondent attempts to cast doubt upon the decision in the Schmutz case by urging that the Court was in doubt as to what the building fund was. It is clearly shown in the Acts themselves that the building fund is nothing but a sinking fund. It is nothing but a fund to repay. It can be raised only under the statutes of Arkansas by a levy and collection of taxes. That principle is established on the very face of said Acts themselves.

The expression in the Schmutz case that the building fund, "whatever that may be," is pledged to the payment of the bonds, instead of narrowing the meaning of the

statutes, broadens it. When Justice Riddick used the language, *whatever the building fund may be*, he had in mind the sources from which the building fund came. The sources were the poll tax, the severance taxes, the tobacco tax, and several other sources found in the statutes, including the eighteen-mill tax. The meaning of Judge Riddick, therefore, was that from whatever source the building fund, or sinking fund, or repayment fund came, it was a fund for repayment and was pledged by the Acts themselves as a repayment fund.

Respondent makes another untenable contention for the purpose of supporting the decision of the Court of Appeals, which contention is to the effect that the case of *Erie Railroad Co. vs. Tompkins*, 304 U. S., 64, is the basis of the ruling of the Court of Appeals of the Eighth Circuit. The Erie railroad case, instead of supporting that contention, in our opinion absolutely denies it.

It is contended by respondent that the Federal Courts are bound by the decisions of State Courts on all questions of general law. As to the exact meaning we refer the Court to this Court's opinion in the Erie Railroad case. Now the respondent by the language above quoted, as we contend, admits that the statutes themselves pledge the revenues; and if that is true, the board of directors were given ample power to pledge them, and therefore the Court of Appeals was bound by that decision, and under the authority of the Erie Railroad case said Court of Appeals did not have the power to announce a view antagonistic to the view expressed in the Schmutz and Trumann cases.

But respondent further contends that the decisions in the Horne and Pledger cases are merely changes of the rules of law in Arkansas. That, too, is an untenable position. The changes made, as indicated by the respondent in the language above quoted, are the changes due to Acts 169 of 1931 and 28 of 1933. That is plainly shown in the Horne case for the reason that the Court was thus construing the result of votes as to millage as found in Act 169. In the Pledger case, which is based on the Horne case, as well as on the statute, it is made clearer that the decisions in those two cases are based upon Acts 169 and

28. Therefore, the contention of respondent on that subject is refuted by the decision of this Court in the case of *Tidal Oil Co. vs. Flannagan*, 263 U. S., 444. In that case this Court in an opinion by Chief Justice Taft pointed out that the impairment of the contract was caused by the statutes and not by the judgment of the Court construing the statues. The construction of the statute given by the State Court, except in cases where impairment of contracts are involved, may be accepted by the Federal Courts.

IV

OTHER STATUTES SHOWING THAT THE BOARD OF DIRECTORS HAD ABSOLUTE POWER TO MANAGE AND CONTROL THE SCHOOLS, WHICH INCLUDES THE POWER TO RAISE FUNDS BY PLEDGING THE REVENUES FROM WHATEVER SOURCE DERIVED.

Section 4 of Article XIV of the Constitution of the State of Arkansas (Pope's Digest, page 147), being that part of the Constitution providing for public schools as the "safeguards of liberty and the bulwark of a free and good government," authorizes and requires the Legislature of the State to invest in and confide to certain officers the management, control and operation of the public schools. The Legislature obeyed that section of the Constitution by requiring the electors to elect six directors in all the special school districts of the State. That was first enacted in Act 13 of 1869. We printed that Act in an appendix to our brief on petition for certiorari. The Legislature selected the directors as the officers authorized to administer the school laws and operate the schools. No power under that Article of the Constitution, or any other Article, or under any Act, was given to the electors to exercise any control over the management and operation of the schools. They had the power to vote for or against taxes, but no other power. It is essential that the management and control of schools should be vested in and confided to some officers. The Acts authorizing the issuance of these bonds heretofore referred to are embodied in Sections 8977, 8978 and 9010 of Crawford & Moses' Digest of the statutes of Arkansas, 1921.

The Supreme Court of Arkansas upheld the broad and far-reaching powers of the board of directors in the case of *Pertuis vs. Williams,* 137 Ark. 425, 208 S. W. 789. Construing its own laws and Constitution in that case the Court said:

> "Article 14 of the Constitution of 1874 provides for a suitable and efficient system of public schools. Section 4 provides that the supervision of the public schools, and the execution of the laws regulating the same, shall be vested in and confided to such officers as may be provided for by the General Assembly. Pursuant to this Article of the Constitution, our General Assembly has provided for a comprehensive system of public schools and has confided the management and regulations of the same to a board of directors."

When the bonds were issued, the words in Act 248, as amended, "under such conditions and regulations as to time, amount, rate of interest and manner of payment as the board of school directors of said school district shall prescribe," excluded any possible power in a voter, and imposed the entire management upon said directors. No officer other than the directors had any power in making a contract for the issuance and sale of the district bonds. By that language "the manner of payment" was confided wholly to said board of directors. The sole power of allocating the taxes, the proceeds of the eighteen mills, was vested exclusively in the directors. It was the duty of said board to say how many of the eighteen mills shall be used to pay the bonded debt, and how many, if any, for the operation of the schools. The said board has refused to discharge that plain duty, and hence it may be enjoined. The manner of payment, which said board must determine, includes the source from which the payment must come or is to be made. The manner of payment includes the means of payment. *In re Mona,* 16 Utah 100, 50 Pac. 810; *City of Erie vs. Caulkins,* 85 Pa. 247, 27 Am. Rep. 642. The use of the word *payment* is significant. The mortgage is *security,* not *payment.* A payment cannot be made with the real property. A payment can be made only with cash or liquid funds. Payment does not mean *security* for the debt.

From these Arkansas statutes and decisions, we must respectfully urge that the power of allocation of the taxes as well as all other income of the special school district, is lodged solely and alone with the board of directors. Until the decision in the Horne case, which was based upon Act 169, and referred to taxes which had been voted under that Act, there is not a scintilla of law showing that the electors have any power over the issuance of bonds. It is, in our opinion, a truism in law that when one set of officers are given the power to issue bonds by a municipality, no set of voters has the power to impair the contract made by the directors. We therefore respectfully urge that the statutes of Arkansas authorizing these bonds themselves pledged the revenues and that the Supreme Court of Arkansas so held, and if we are mistaken in that, then the above statutes and decisions make it plain that the directors are given power to pledge the revenues, and therefore the Court of Appeals was clearly in error in holding that the board of directors were without power to pledge said revenues.

We have discussed above the question of the validity of the pledging of the revenues by the directors. In conclusion on that subject we respectfully suggest that if this bond issue has two obligations, such as the pledging of the revenues and the providing of a sinking fund, or building fund, or repayment fund, an impairment of one of those obligations by Acts 169 and 28, heretofore referred to, requires the reversal of this case even though the board of directors had no power to pledge the revenues. The obligation of the contract of a general creditor cannot be impaired any more than the contract of a secured creditor.

V

ERROR OF COURT OF APPEALS AS TO WARRANTS AND BONDS PAYABLE IN FUTURE

The evidence of indebtedness described in Act 248 of 1905, being the law under which these bonds were issued, covers notes, bonds and warrants. These evidences are payable in future under the express terms of Act 248, and the directors are expressly required to pledge the reve-

nues. Sections 1 and 2 of said Act plainly authorize the directors, if the evidences are payable in the future, to pledge the revenues. In other words, Act 248, as amended, if the evidences require present or immediate payment, does not require pledging of the revenues. Pledging of the revenues is necessary only when payment is in the future. An order to pay made by the directors, or a warrant for immediate payment made by them, needs no pledge of revenues. On the other hand, a bond, warrant or other evidence of indebtedness payable in future, does need for security a pledge of the revenues. The order or warrant for immediate payment assumes that there is cash in the treasury to pay the sum named in said warrant or order. The provision in the statute declaring that warrants are valid even if there is no money in the treasury to pay the same, refers only to warrants payable in the future. Therefore the warrant payable in the future is in legal effect and meaning the same as a bond. This reasoning proves that under said statutes, as well as under the general policy empowering school districts to borrow money, it was necessary to make provision at the time of issuing the bonds for the payment thereof. Hence, authority to make such provisions necessarily granted the power to make same. Under said statute, as amended, it is in effect plainly enacted that every evidence payable in future must carry a pledge to repay. The building fund which is created under the statute is a fund raised by the levy and collection of taxes. Hence the building fund is in reason and legal effect a repayment fund. This was so decided by the late District Judge John E. Martineau by the orders which he made in this case. He actually set aside the building fund by requiring the directors and officers to set aside revenues for said fund. See Act 25 of 1913, page 115. See Act 160 of 1917, page 857.

VI

REASONS FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

In petitioners' petition for the allowance of the writ of certiorari (see pages 8-9), among others, two reasons are assigned for the granting of the writ: One is that the

decision of the Court of Appeals of the Eighth Circuit is in conflict with the decisions of this Court. The other is that said decision of the Court of Appeals in the instant case is in conflict with other decisions of the Court of Appeals. We think the authorities cited below establish these two propositions clearly and effectively.

VII

WE MOST RESPECTFULLY URGE THAT THE UNDISPUTED FACTS IN THIS RECORD ESTABLISH BEYOND DOUBT THE IMPAIRMENT OF THE CONTRACT OF REPAYMENT EMBODIED IN THE BONDS.

When the claim is made that a statute of a state impairs the obligation of a contract, this Court determines for itself whether there is a contract and whether that contract is impaired. *Tidal Oil Co. vs. Flannagan, supra.*

We desire first to cite the decisions of this Court establishing the impairment of said contract by Acts 169 and 28 above referred to. We refer to the following decisions of this Court:

In *Green vs. Biddle,* 8 Wheat. 84 (opinion by Justice Story) it was said:

> "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

In *Planters' Bank vs. Sharp,* 6 Howard, 327, it was said:

> "One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not by the Constitution to be impaired at all.

> This is not a question of degree or cause, but of encroaching, in any respect, on its obligation, dispensing with any part of its force."

And also in *United States ex rel. Hoffman vs. Quincy*, 4 Wallace, 535 (Justice Swayne):

> "When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the Act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that Act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist."

And also:

> "The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The Act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that Act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the Constitution a shadow and delusion."

In our brief on petition for certiorari we cite *Hubbel vs. Leonard*, 6 Fed. Supp., 145 (see brief, p. 16), and quote therefrom, wherein this Court in the case of *United States ex rel. Von Hoffman vs. Quincy*, supra, decided the controlling principles governing the decision in the present case. This Court in specific language above quoted held that any statute of a state impairing the obligation of a contract was invalid. This Court in that case among other things said:

"The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of the contract 'is the law which binds the parties to perform their agreement.' *Sturgis vs. Crowninshield*, 4 Wheat., 122. The prohibition has no reference to the degree of impairment."

In the case of *Sturgis vs. Crowninshield*, 4 Wheat., 122, this Court, by Chief Justice Marshall, said:

"A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it."

In the Quincy case this Court, in reversing the lower Court, directed the lower Court to issue a writ of mandamus compelling the levy and collection of the taxes to pay the bonds.

Another case by this Court we refer to as being squarely in point. We refer to the case of *Shapleigh vs. San Angelo*, 167 U. S., 648. In that case this Court held that an Act of the Legislature giving the voters a right to prevent the payment of the obligation of the bond, impaired the obligation of its contract. In the case at bar that is the precise question involved. Acts 169 and 28 above referred to, as construed by the Supreme Court of Arkansas, give the electors a right to destroy the obligation of the bond contract. We respectfully urge that when the Legislature of Arkansas by Act 169 repealed all laws governing the issue of bonds by special school districts, as it did in Section 196 of that Act (Acts 1931, page 584), and in the same Act authorized a procedure by which the electors were given power to prevent the payment of the bonds by voting to use all the revenues of the district for

maintaining the schools, except the tobacco taxes and severance taxes, it impaired the obligation of said contract. It is admitted (R. 83) by the respondent that it cannot pay these bonds because it needs the money to operate the schools. That of itself is sufficient under the decision in the last case cited to impair the bond contract as a matter of law.

We also refer, as sustaining our contention that the contract is impaired, to the following cases:

Tidal Oil Co. vs. Flannagan, 263 U. S., 444 (opinion by Chief Justice Taft).

W. B. Worthen Co. vs. Cavanaugh, 295 U. S., 56 (opinion by Justice Cardozo).

Provident Life & Trust Co. vs. Mercer County, 170 U. S., 593 (opinion by Justice Brewer).

W. B. Worthen Co. vs. Thomas, 292 U. S., 426 (opinion by Chief Justice Hughes).

United States vs. City of New Orleans, 98 U. S., 381.

In addition to the above cases we make the following observation on this subject:

The Constitution of the United States plainly states that no state shall pass any law impairing the obligation of contracts. It follows as a matter of law and logic binding upon all persons and all Courts that a state is without power to pass a law authorizing and empowering the voters of a school district to impair the obligation of a contract. A state being without such power necessarily has no power to authorize voters to do that which the state cannot itself do. The district in its answer and its counsel in their brief admit that the bonds are valid contracts; they admit owing the money. They admit this in their brief by offering to pay 42 cents on the dollar. They admit by their pleading and brief that these bonds were valid when issued. They admit by the evidence of their president (R. 157-8) that it was the intention of the district to pay the bonds and interest by the revenues of the district. They do not contend that prior to Act 169 and Act 28, elsewhere referred to in our brief, that there existed any power in the voters to impair the obligation

of the bond contracts. It follows from their admission that the state, by the Acts above named, has attempted to impose a condition upon the bonds which condition did not exist at the time they were issued and sold. In other words, said Acts of Arkansas authorized the voters to defeat the payment of the bonds by power which did not exist at the time the bonds were sold. It follows, therefore, that this case falls squarely within the decision of this Court in the San Angelo case elsewhere cited and quoted from. In that case this Court squarely held that giving the right to the voters which did not exist prior to the issuance of the bonds impaired the obligation of the contract.

In the final decree in the court below (R. 70-80) the District Judge as a part of said decree said (R. 77):

> "The Court declares the law to be that the plaintiff and intervenors have a prior lien on the real estate described in the respective mortgages or deeds of trust, and *all revenues of the district from whatever source derived.*"

Also (R. 76-77):

> "The Court finds that the improvements constructed on the real property described were erected for school purposes only, *and that it was not within the contemplation of the parties that said real estate or school buildings should be the sole security pledged for the bonded debt. * * * that it was contemplated and agreed that the bonded debt of the district should be paid out of its future tax revenues* in the manner provided for in said respective deeds of trust and that said pledge of revenues to secure the payment of said bonds is a prior and superior lien to all other liens or debts of the district * * * "

Also in said decree appears this (R. 79):

> "The Court reserves jurisdiction of this cause to enter such further or other orders as may be necessary to enforce the rights of the parties hereto and to direct a sale of the real property of said district, should it become necessary to sell the same."

In the findings of fact and conclusions of law connected with said final decree, and as a part thereof, the Court said (R. 69):

> "The Court is therefore of the opinion, after considering all of the evidence, that it would be unconscionable to declare this bond issue to be void, and the district is estopped to so claim."

It will be observed that the reservation of jurisdiction over the cause was for the sole purpose of enforcing the rights of the parties. The Court did not reserve any jurisdiction for the purpose of reducing the millage to be paid to the bond owners from nine mills to six mills. In fact, the Court's decree made afterwards allocates every penny of the eighteen mills to the maintenance of the schools. That is done in the very teeth of Amendment No. 11 of the Constitution of Arkansas. Amendment No. 11 (Pope's Digest, page 185) expressly states that the eighteen mills, when voted, are for three purposes: Maintenance of schools, construction of buildings, and payment of debts created to construct buildings.

In construing the meaning of this decree the Court should keep in mind the decision of the Supreme Court of Arkansas in *School District of Hartford vs. West Hartford School District*, 102 Ark. 261, 143 S. W. 895. That decision was rendered by the Supreme Court of Arkansas prior to the submission of Amendment No. 11 to the people of the state. In that Hartford case the Supreme Court of the State held that taxes voted for teachers' wages could be used for the purpose of constructing buildings, and that taxes voted for constructing buildings could be used to pay teachers' wages. That decision was well known to the people of Arkansas when they voted upon Amendment No. 11 at the election in October, 1926.

Both before and after the adoption of Amendment No. 11, the Constitution of Arkansas contained the same provisions regarding the use of millage taxes.

VIII

ESTOPPEL OF DISTRICT TO CLAIM DEFENSES SET UP IN ITS RESPONSE

We have shown that the response or counter-claim was filed in the lower Court (R. 83) more than a year after the Court had declared in the final decree that the bond issue of 1931 became effective prior to the effective date of Act 169. On that subject the final decree has this language (R. 65):

> "All of the above evidence conclusively shows this 1931 bond issue in the principal sum of $105,000.00 was issued prior to Act 169 of the Acts of the General Assembly of Arkansas for 1931 taking effect."

We also suggest that the respondent is not entitled to any consideration of the question of any excessiveness of the loan. On that subject the final decree has this language (R. 65):

> "It is contended by objecting intervenors and defendant that in the event said Act of 1931 was in effect that the bond issue is void because it would create an indebtedness of the district in excess of the legal restrictions contained in Act 169 of 1931. The evidence introduced in the case does not reflect that an addition of $105,000.00 to the bonded indebtedness of defendant school district would have exceeded the statutory limitation for indebtedness, as set forth in said Act 169 of 1931. It, therefore, appears that this bond issue took effect prior to the taking effect of Act 169 of the Acts of 1931 of the General Assembly of Arkansas; but, even if said bond issue did not take effect prior to the said statute becoming law, the bond issue is still not invalidated by this enactment."

It is our contention that the so-called answer, or response, or counter-claim of the district is in conflict with the decree of the District Court, being the final decree elsewhere referred to. It is well settled that a litigant in the course of the litigation will not be permitted to occupy inconsistent positions. This suggestion may be of little weight, but it does seem to us that the district in this case

should not be permitted to take the position that it does in its so-called counter-claim and its denial. It had no pleading in the case prior to the final decree.

We refer to the above findings and conclusions in the final decree for the reason that the record shows there was no appeal from that final decree. We therefore respectfully urge that when the Court of Appeals attempted to declare that the petitioner had no lien on the revenues from whatever source derived, said Court inadvertently overlooked the finding in said decree. We cannot see how the Court of Appeals could change the former decree when the respondent did not file its so-called motion and counter-claim for more than a year after the decree of June 28, 1938. In other words, the decree of the date last named became final, and the Court of Appeals was without power to change it, there being no appeal from it. It cannot be said that the attention of this Court was not called to that decree. See our brief on petition for writ of certiorari, page 2; and brief of *amicus curiae,* pages 40-41. The *amicus curiae* filed said brief claiming the same relief claimed by the petitioners and praying that the petition for certiorari should be granted. Hence this Court had that situation before it when the petition for certiorari was submitted. We do not refer to the above decree and the doctrine of estoppel for the purpose of proving our contention that the contract was impaired. We refer to said decree (R. 70) and its effects to show that respondent in a case involving the impairment of the bond contract makes its contentions embodied in its so-called defenses (R. 83).

After the final decree had been rendered, and on February 6, 1939, the directors not having paid the amounts due on the bonds, either of principal or interest, the petitioners filed a motion (R. 80) in the Court for the purpose of enforcing their rights embodied in the decree as above shown. Thereafter, the respondent on September 27, 1939 (R. 83), more than a year after the final decree of June 28, 1938, was entered, filed a so-called response or defense to the motion of the petitioners to enforce their rights. Respondent did not deny the debt nor the contract and has never denied it. Its chief contention, in that so-called response, is that it owes the debt but cannot

pay it because it needs the money for the maintenance of the schools. In Act 248 as amended it is made perfectly clear that in the issuance of bonds special school districts stand as a natural person. Properly considered, the so-called response of the respondent amounts to an assertion that its representations in the bond proceedings and in the bonds were absolutely false. Would a natural person be permitted to make any such defense? The respondent secured by these representations, which it now claims in effect are false, $160,000.00 for the construction of necessary buildings and the payment of debts, and yet it now attempts to contend that it is entitled to relief although it secured that money under false representations. We respectfully submit that the respondent is estopped, as indicated by the decision of the Honorable District Judge, from making any such contention.

IX

THE DECISION OF THE COURT OF APPEALS OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH OTHER DECISIONS OF THE SAME COURT.

It is unnecessary to argue this point at length. It is sufficient to cite the case of *Sovereign Camp W. O. W. vs. Gillespie*, 87 Fed. (2d), 944.

On this point we also cite the case of *Hubbell vs. Leonard*, 6 Fed. Supp., 145.

CONCLUSION

We are, of course, uninformed as to the reasons leading this great Court to deny the writ of certiorari. We believe that the contract has been impaired. By said Acts of the Legislature, as shown above, the debt will never be paid. It cannot be paid because, as the respondent says, it needs the money to operate the schools. On that subject we refer the Court to the evidence of Frank Eaton, the auditor appointed by the District Court to make an examination of the financial affairs of the district. That auditor (R. 114) gave it as his opinion that with proper bookkeeping and careful administration of the school affairs, and considering the revenues that were then coming in, the district would be able to operate the schools and yet pay very considerable sums on the debt for the construction of buildings.

It is our view that the petitioners are entitled, as a matter of absolute law, to have the petition for rehearing granted and to have the petition for certiorari granted, to the end that the great public questions involved may be brought out in the open, argued orally, re-examined by this Court, and decided as the Court finds that justice and right demand. The facts in the record show that the bond owners have ever been ready to make a reasonable disposition of the controversies and to refund the bonds. It is not necessary for the Court to rely upon that evidence or indication in reversing this cause. The case should be reversed and remanded, and the directors should under the direction of the District Court make such allocation of the funds as ought to be made. In that way the district, especially since it may obtain more than $10,000.00 a year from the revolving fund, will be enabled to keep the schools open and pay its honest debts. The whole matter in that event can be heard by the District Court and justice meted out to all concerned. The record shows (R. 105) that during the period covered by the evidence of Auditor Eaton the district received $53,000—approximately $10,000.00 per year from the revolving fund. The law authorizing State aid to needy school districts was

sustained by the Supreme Court of Arkansas in *State Board of Education vs. Aycock*, 198 Ark. 640, 130 S. W. (2d) 6.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals be, upon further consideration, reversed.

Respectfully submitted,

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J. W. HOUSE,
Boyle Bldg., Little Rock, Ark.,
Counsel for Petitioners, George E. Morton and City National Bank.

JUSTIN D. BOWERSOCK,
Kansas City, Mo.,
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S. L. WHITE,
Union National Bank Bldg.,
Little Rock, Ark.,
of Counsel for Petitioners.

CERTIFICATE OF COUNSEL

We, James B. McDonough and J. W. House, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JAMES B. McDONOUGH,
J. W. HOUSE,
Counsel for Petitioners.

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In the
Supreme Court of the United States

OCTOBER TERM, 1941

No. 354

GEORGE E. MORTON, Trustee, and
CITY NATIONAL BANK, Trustee, and
Individually ..... Petitioners

vs.

DARDANELLE SPECIAL SCHOOL DISTRICT
NO. 15, YELL COUNTY ARKANSAS ..... Respondent

MOTION OF PETITIONERS FOR LEAVE TO FILE A SECOND PETITION FOR A REHEARING AND FOR RECALLING CERTIFIED ORDER— SEE PARAGRAPH 11 BELOW

Come the petitioners, by their counsel, and respectfully move this Court for leave to file a Second Petition for Rehearing, which motion is based upon the following grounds:

1. The Court of Appeals in this case based its affirmance of the cause upon the untenable ground that said Court of Appeals in the case of *Women's Catholic Order of Foresters v. Special School District of North Little Rock*, 105 Fed. (2d) 716, had decided the question of impairment of contracts against the contentions of petitioners. An examination of the opinion of the Court of Appeals in said last cited case demonstrates to a mathematical certainty that the question of the impairment of contracts was not raised by the parties in that case and hence not decided by the court. It therefore follows that every-

thing said by the Court of Appeals in said North Little Rock case is wholly *obiter dictum* and is not binding upon said Court of Appeals nor upon this or any other court. This question is fully discussed in our Petition for Rehearing—See index thereof.

2. This error alone is sufficient to demand of this Court as a matter of justice and right the granting of the petition for a rehearing and the granting of the writ of certiorari.

3. It has never been held either by this Court or any other court to our knowledge that an *obiter* decision is sufficient in force and power to repeal the contract clause of the Constitution of the United States.

4. It is claimed by the respondent that the Court of Appeals in the instant case decided and held that the instant case was controlled by the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. We challenge the correctness of that contention. But if true, it shows a basic and untenable error on the part of the Court of Appeals for which there should be a reversal.

5. The Court of Appeals as a matter of absolute law was compelled, and is compelled, to accept the decision of the Supreme Court of Arkansas in the case of *Schmutz v. Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438, and the case of *American Exchange Trust Co. v. Trumann Special School District*, 183 Ark. 1041, 40 S. W. (2d) 770. This, in our opinion,, is absolutely certain by reason of this Court's opinion in the *Erie Railroad Company* case. In the cases cited the Supreme Court of Arkansas not only held that the board of directors of the school district had the power to pledge the revenues, but in the same opinions declared that the statute itself pledged the revenues, thus making the pledge of the revenues at the time these bonds were issued absolutely certain and binding upon this Court and all other courts.

6. It is also certain in our opinion, beyond a shadow of doubt, under the decisions of the Supreme Court of Arkansas in existence at the time of the issuance of these bonds, that there was an enforceable contract to repay the

borrowed money. All that the Court of Appeals said on this subject is really and truly beside the question. The school district had no other means under the sun to repay the borrowed money except from the revenues of the district. These revenues were dedicated to the purpose of repayment by the statute and by the decisions of the Supreme Court of Arkansas in the cases referred to.

7. All that the Court of Appeals said in its opinion as to "later decisions" of the Supreme Court of Arkansas is plainly *obiter*, for the reason that the Supreme Court of Arkansas in the *Horne* (186 Ark. 1000, 57 S. W. (2d) 568) and *Pledger* (189 Ark. 562, 74 S. W. (2d) 646) cases make it plain that the statutes (Act 169 of 1931 and also Act 28 of 1933), as construed by the Supreme Court of Arkansas, give power to the electors of the district that did not exist at the time of the issuance of these bonds.

8. It is undisputed that, based upon the decisions of the Supreme Court of Arkansas in the *Schmutz* and *Trumann* cases, more than twenty-three millions of dollars of bonds were issued by special school districts and that a large number of these bonds is still outstanding. It follows from what is said above, and what is said in our first petition for a rehearing, that the Acts of Arkansas above referred to (169 and 28) absolutely destroy the bonds sued on. The district received the cash for these bonds. It constructed with said cash necessary school buildings. It has used the buildings constructed by the proceeds of the bonds of 1926 for fourteen years. It received more than $100,000 as the proceeds of the second bond issue, which bond issue was issued at the very depth of the great depression. Without that bond issue the district could not have paid its former debts and built a high school. It has used that building for ten years and its previous debts were paid by the proceeds of that issue. These facts establish beyond the shadow of a doubt that the Acts of Arkansas complained of, as construed by the Supreme Court of that State, not only impair the obligation of the contract in violation of petitioners' rights under the contract clause of the Constitution of the United States, but also in effect deprive the petitioners of their property in the

bonds without due process of law and in violation of their rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States. If this Court refuses to grant the writ of certiorari, it will approve the decision of the Court of Appeals of the Eighth Circuit which decision gives power to a State Legislature to abolish a clause of the Constitution of the United States.

For these reasons, and upon the reasons given in our first petition for a rehearing, and upon the second one printed below to which we respectfully refer this Court, in our opinion there is no escape from granting the petition for certiorari as a matter of justice and right. We are not, however, basing this application solely upon that ground. We are basing it upon the further ground that the petitioners will suffer irreparable damage and injury by the failure of this Court to take jurisdiction and decide this case as the law and justice may warrant.

9. In our opinion the most unteniable and astounding declaration of the Court of Appeals is that the board of directors of the school district was without power to pledge the revenues. In order that the Court may understand this point it is necessary to make a short explanation. In the final decree of June 28, 1938, the District Court (R. 70) and in the findings of facts and declarations of law of that decree (R. 60-80) and see specially the findings and declarations on pages 76-77, declared absolutely *that the school district had power to pledge the revenues.*

That decree which was a final decree in support of our statement above has this specific language (R. 77) "That at the time of the execution of said respective deeds of trust and the issuance of said bonds, the district was duly authorized and empowered to borrow money and mortgage the real property of the district and pledge its future revenues to secure the payment thereof." The district could act only through the board of directors hence said district court declared as a matter of law that said board had power to pledge the future revenues. The Supreme Court of Arkansas so declared in the *Schmutz, Trumann* and *Partuis* cases cited in the petition for rehear-

ing and in our brief on petition for certiorari. We have shown in our first petition for rehearing as well as in our brief for certiorari *that the statute itself* (Act 248, 1905 as amended) *pledges the future revenues to repay the bonds.* The respondent had filed no pleading at or prior to said decree of June 28, 1938, asserting that the board of directors nor the school district had no power to pledge the future revenues. *The district took no appeal whatever from the decree of June 28, 1938.*

More than a year after said decree had become final the district filed an attempted defense (R. 83) setting up alledged defenses which are wholly unteniable. The said response (R. 83) is wholly ineffective, not only because the district never appealed from said final decree but also for the reason that no court of justice will ever permit a natural person to make such a defense. Act 248 as amended prohibits the school district from setting up any defense which would not be available to a natural person.

In addition the decree of June 28, 1938, reserved no right to the school district to have the rights given to the petitioners set aside. *The only power which the District Court reserved in said final decree was the power to enforce the rights of the parties* (R. 79-80). The ~~respond-~~ Petitioners ents moved in the District Court to enforce their rights under said decree on February 6, 1939, praying an order to allocate the entire eighteen mills to the payment of the bonded debt. The bond owners had the right to ask that relief for the unanswerable reason that the final decree had declared that said bonds were a first lien on all the future revenues of the district (R. 76-77). Said final decree on this subject has this language (R. 79-80). "The court reserves jurisdiction of this cause to enter such further or other orders as may be necessary to enforce the rights of the parties hereto and to direct a sale of the real property of said district, should it become necessary to sell the same."

Petitioners motion to enforce their rights under said final decree clearly comes within the above language. The districts so-called defenses (R. 83) praying in effect that all future revenues on which bond holders had a prior lien

be used exclusively to operate the schools does not come within such language. To authorize a litigant to any relief there must be some pleading. The district filed no pleading entitling it to such relief until said final decree was more than a year old. This plain error of the Court of Appeals stresses the misconception of the issues by said court and also demonstrates that there was no issue before that court on that record challenging the power of the directors to pledge the revenues. Since the issue of the power of the directors was never made until long after the final decree and since the district filed no motion for a rehearing nor made any effort to set aside said decree it follows as a matter of law and justice that the petition for certiorari should be granted. These questions necessarily arose on the record in petitioners petition for certiorari and are fully discussed and earnestly urged in our first petition for a rehearing. The index in that petition locates to a certainty the pages where found.

10. *The questions involved are of the highest importance to all special school districts of Arkansas and to the owners of the millions of dollars in bonds of the special school districts of the state.* The amount of the indebtedness involved being the amount of the bonds owned by the petitioners and the interest thereon approaches $200,000.

In our application for the writ and our brief thereon we show that the public records of Arkansas establish the fact that more than twenty-three millions of bonds were issued and sold after the decision in the *Schmutz* case and before the passage of 169 and 28 elsewhere referred to. Respondent claims that a large amount of said bonds have been refunded. There is no evidence to show the amount of refunding. In our reply brief we called the attention to the fact that at least half of the original issue is still outstanding. But this suggestion of respondent when properly analyzed shows the great wrong done to bond owners by the passage of Acts 169 and 28. The purpose of an act of the legislature may easily be established by its effect. It is reasonable to infer the purpose of the act from its effect. The effect of 169 as construed by the Supreme Court of Arkansas is to frighten terribly all bond owners

of special school districts of Arkansas. Such act necessarily destroys the value of all special school district bonds.

It does so because it gives to the elector a power which did not previously exist to destroy said bonds by voting eighteen mills without stating the purpose for which said mills are voted, the Arkansas court holding that such a vote authorized the use of all the proceeds of said eighteen mills for operating the schools, thus plainly desregarding amendment number eleven to the Constitution of Arkansas which names three purposes for the use of said eighteen mills. Naturally the effect of such a ruling as in the *Horn* case is to notify the elector that he is given a new power which enables him to destroy the value of all special school district bonds. Hence the effect of such statutes as construed by the Supreme Court of Arkansas is clearly confiscation, pure and simple. There can be no escape from these plain facts. We therefore believe that justice and right demand that the petition for certiorari should be granted. If such writ is not granted uncertainty and doubt as to the value of millions of dollars of special school district bonds create a horrible condition as to financial dealings in such bonds. In other words who can foretell when such bonds are issued though valid they will have any real value whatever. The special school districts of Arkansas cannot maintain schools without buildings. The proceeds of these bonds constructed necessary school buildings without which no schools could be had. The purchasers relied upon the honor and the integrity of the school district and upon the representations that the revenues were pledged to repay and upon the representation that the district would repay as provided in the proceedings and now the district contends that it will pay only forty-two cents on the dollar thus confiscating fifty-eight cents of every dollar. It would seem clear that the confiscation of fifty-eight cents of every dollar of two hundred thousand dollars plainly establishes the impairment of the contracts.

We sincerely and firmly believe that if this court can re-read our petition for rehearing and re-study the auth-

orities and statutes therein cited there can be no escape from granting the petition for certiorari.

11. On November 24 after our motion for leave to file the second petition for a rehearing had been placed in the hands of the printer with a copy of said petition the writer received a letter from the clerk of this court advising that on October 18 said clerk had forwarded to the clerk of the Circuit Court of Appeals of the eighth circuit a certified copy of the order denying the first petition for a rehearing. The writer had previously telegraphed the clerk asking that any order be withheld until the second petition could be printed and filed.

We find no rule or law limiting the power of this court to sustain this motion for leave after a certified copy of the order has been sent to the clerk of the lower court. The telegrams and letters between counsel for the petitioners and the clerk show diligence on the part of counsel in preparing and presenting the motion for leave and the motion to recall the order. We request the clerk to produce these telegrams and letters for the information of this court. Besides the documents were presented at the same term of the court and while the court had full and complete power over all its orders. We suggest and urge that in the circumstances it would be harsh and unconscionable for this Court, a Court that loves justice, to deny the rehearing as such denial would inflict upon petitioners an irreparable loss without fault of petitioners. We call this Courts attention to the letter of the clerk suggesting that a second petition for rehearing was not authorized as a matter of right and that such petition must be preceded by motion for leave to file. Said letter made no mention of the sending of the certified order. We place no blame upon the clerk. We are placing all facts before this court. We therefore pray that said order be recalled if necessary and that petitioners be granted the relief prayed for. We telegraphed the clerk asking that the order be withheld at once upon receiving a letter from the clerk advising that a motion for a leave to file a second petition should precede said second petition.

We therefore, upon the matters above stated, and up-

on those set forth in our first petition for a rehearing, respectfully pray this Court to grant the petition for a rehearing and to grant the application for a writ of certiorari and to place the case upon the docket and hear oral argument and further briefs, if necessary.

We regret the length of the motion for leave and of the second petition for rehearing. The great importance of the questions involved and the amount involved made it our duty as counsel for petitioners to present the questions to this court as we have done notwithstanding said documents are slightly longer than we wished.

The petitioners herewith submit along with this motion for leave to file same a copy of the Second Petition for a Rehearing, and have filed the original of the same with the Clerk of this Court in this cause, and have also filed the original of this motion for leave to file same.

Respectfully submitted,

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JUSTIN D. BOWERSOCK,
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Union National Bank Building,
Little Rock, Arkansas
Of Counsel for Petitioners.

CERTIFICATE OF COUNSEL

We, James B. McDonough and J. W. House, certify that they are members of the Bar of this Court, and that they have carefully re-examined the questions involved in this second petition for a rehearing, and also involved in the first, and also involved in the petition for writ of certiorari, and in our opinion, if justice and right is to prevail, there cannot be any escape from the granting of the petition for certiorari and that the second petition for rehearing is not filed for delay but that justice may be done.

JAMES B. McDONOUGH,
J. W. HOUSE,
Counsel for Petitioners.

No. 354

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1941

GEORGE E. MORTON, Trustee, and
CITY NATIONAL BANK, Trustee, and
Individually ..... Petitioners

vs.

DARDANELLE SPECIAL SCHOOL DISTRICT
NO. 15, YELL COUNTY, ARKANSAS ..... Respondent

SECOND PETITION OF PETITIONERS FOR A REHEARING

Petitioners have prepared this second petition for a rehearing, the same to be treated as the original and to be attached to and printed with the motion for leave and to avoid repetitions as far as possible the petitioners request that the above motion be treated as a part of this second petition for a rehearing as though set out in full herein; and for the same reason petitioners request that their first petition for a rehearing be treated as a part hereof as giving the basic reasons for the granting of the petition for certiorari.

Article 14 of the Constitution of the State of Arkansas makes it the bounden duty of the state legislature to provide for the children of the state an efficient system of free schools. The state has endeavored to comply with that high duty by providing for donations and loans from state funds to aid needy school districts.

The high school is a part of such school system. By Act 13 of the legislature of 1869 authority is given to the electors of school districts in cities and towns for the better management of schools by the election of six directors to whom is confided the entire management and control of all schools in special school districts (see *Partuis v. Williams*, 137 Ark. 425). Before the state legislature pro-

vided for aid to needy school districts it became necessary for special school districts in cities and towns to borrow money to build necessary school biuldings, since there could be no schools without necessary buildings. The first general act of the state legislature giving full and complete authority to the board of directors to borrow money was act 248 of 1905. Of course the authority given to the directors to borrow money necessarily carried with it the power to provide the means of repayment and also the power to contract to repay. Such implied power exists in the board without any specific statutory authority therefor. Said Act 248 gave ample and specific authority to provide the means of repayment and to make a valid contract for repayment. The only means of repayment was the future revenues of the district. The Arkansas Supreme Court held that the general Act 248 as amended in 1913 and 1917 was broader in the grant of powers than any of the special acts (*Hampton v. Hickey*, 88 Ark. 324). In addition to that said Supreme Court of Arkansas in *Schmutz v. Little Rock Special School District*, 78 Ark. 118 and in *American Exchange Trust Co. v. Trumann Special School District*, 183 Ark. 1041, decided after Act 169 of 1931 was passed, held in construing said act 248 of 1905 as amended that the board of directors had power to pledge future revenues for repayment of the borrowed money. The Schmutz case was decided in 1906, the Trumann case in May, 1931. In those decisions the Supreme Court of Arkansas also held that the statute itself pledged the revenues to repay the bonds.

The respondent in its brief opposing the writ of certiorari admits that said statutes seem to grant the power to the board to pledge the revenues and seeks to escape the effect of that admission by claiming that the *Horne* and *Pledger* cases were mere changes in the law. That contention is based upon the clearly erroneous opinion of the Court of Appeals. During the period following the decision in the *Schmutz* case in 1906 up to the passage of 169 of 1931 the special school districts in Arkansas relying upon Act 248 as amended issued and sold in the public markets more than twenty-three millions of dollars of such bonds. During that twenty-five years of bond sell-

ing no court and no attorney to our knowledge in Arkansas doubted or questioned the authority of the board to pledge the revenues and no doubt was ever raised that the statute itself pledged the revenues. These facts are matters of public history and were well known to the people of the state and to all its officials.

Under such state of the law the petitioners bonds were issued and sold to innocent purchasers who relied upon the good faith and integrity of the school district and its representations that a building fund which is nothing but a sinking fund or repayment fund had actually been duly provided. The proceedings of the board so assert and name the amount of the principal and interest which would be paid from the future revenues for each year.

It will thus be seen that all went well with the school districts and the bond buyers until the passage of 169 on March 25, 1931. In these circumstances it is plain that the Court of Appeals and this court also are bound by the decisions of the Supreme Court of Arkansas in the *Schmutz* and *Trumann* cases above cited. The Arkansas Court in those cases was construing the state's own laws and constitution, and the Federal courts under the authority of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 are bound thereby.

It follows that the Court of Appeals was without power to say that the directors had no power to pledge the revenues. Besides the said lower court entirely overlooked and disregarded the decision in the *Schmutz* case to the effect that the statute itself pledged the revenues. Since the statute pledged the revenues without doubt the directors had such power.

In these circumstances it becomes necessary to inquire whether the decisions in the *Horne* and *Pledger* cases were mere changes in the law or whether Acts 169 and 28 impaired the obligation of the contract to repay. We have quoted from the *Schmutz* and *Trumann* cases in our original brief and in part in our petition for rehearing. We refer this court to said brief and said petition for the exact language establishing our contention that the Arkansas Court in these cases plainly held that the board of directors

had the power to pledge the revenues and that the statute itself pledged them.

The purpose of Act 169 is determined by its language and by its effect. The legislature in Act 169, section 196 thereof, specifically repealed all laws in existence at the time of the issuance of these bonds (see Acts 1931, page 584). Said Act 169 begins on page 476 and ends on page 588. For issuing bonds under said Act see Sections 59-69. The Supreme Court of Arkansas in construing that act in the case of *Horne v. Paragould Special School District*, 186 Ark. 1000 and in the case of *Pledger v. Cuttrell*, 189 Ark. 562 based its decision on said act. In those cases in construing said act said court gave power to the electors enabling them by a vote to allocate the whole of the eighteen mills to the operation of the schools. That power did not exist in the electors at the time that these bonds were issued and only existed by reason of said act. Those decisions construing said act enabled the electors to confiscate the property value in the bonds and thus necessarily impair the obligation to repay. This brings the instant case squarely within the rule declared by this court in the case of *Shapleigh v. San Angelo*, 167 U. S. 648 and the case of *Title Oil Co. v. Flannagan*, 263 U. S. 444. See other cases cited in our original brief and in our first petition for a rehearing.

Before a great court like this one, it is our view that it is not necessary to discuss in detail these questions which are named and set out in our motion for leave to file. Our view is, and we say this with the very highest respect for this Court and every member thereof, that through some kind of inadvertance unknown to us, the Court has misunderstood the actual questions involved. We have discussed this case in our petition for rehearing and have there set out the basic reasons upon which our contentions are based. *It is startling to us that in a case as important as this one, and involving the setting aside of the contract clause and of the Fourteenth Amendment to the Constitution of the United States, that any court can say that the agreement to repay the borrowed money is not impaired, and that the annulment of the contract*

clause as well as the annulment of the Fourteenth Amendment is not a matter which should interest this Court to the extent that the petition for certiorari should be granted. With highest respect possible, we earnestly urge that there is not a decision either from this Court or from any other court, save and except the erroneous decision of the Court of Appeals, that will give the power to a State Legislature to annul two clauses of the Constitution of the United States. The mere statement of the question is sufficient to require, as we believe, the granting of the writ of certiorari. Without which these bonds can never be paid. We respectfully request the Court to re-examine and re-read the controlling decisions from this Court and from other courts. It would make this second petition entirely too long to quote from those decisions. The decision of the Court of Appeals in the instant case is squarely in conflict with the decision of the same court in *Sovereign Camp W. O. W. v. Gillespie,* 87 Fed. (2d) 944, and the refusal of this Court to grant the writ of certiorari is squarely in conflict with the decision of this Court in *Shapleigh v. San Angelo,* 167 U. S. 648, and other cases cited on page 17 of our first petition for rehearing. In the *San Angelo* case the exact question came before this Court. In that case the Legislature of Texas passed a law giving the electors in the muncipality the right to say whether or not the new bonds should be held valid. This Court held that the granting of a power to the electors which did not exist at the time of the issuance of the bonds, was an impairment of the contract of repayment embodied in the bonds. In our opinion, the suggestion of the Court of Appeals that the power to pledge the revenues did not exist is in the teeth of the decision of the Arkansas Court in the *Schmutz and Trumann cases, and is in violation of every rule established by this Court from its foundation down to the present time.*

We respectfully urge that there is no authority or decision of any court that will sustain this Court in the refusal to issue the writ of certiorari. We are trying to be frank with this Court. All we have the power to do is to lay before this Court its own decisions and the decisions of other courts, and that we have done in our orginal

brief herein, and also in our petition for a rehearing, and we respectfully refer the Court to those cases in confidence that *the Court cannot possibly find any support either in statute or decision that will sustain the refusal to grant the petition for certiorari.*

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We, James B. McDonough and J. W. House, members of the Bar of this Court, hereby certify that we mean no disrespect to this Court nor any member thereof. We are sincere in the belief that a serious and grave error is about to be committed. The bond owners bought their bonds in good faith. And we further certify that in our opinion this second petition for rehearing is filed, not for delay, but that justice may be done.

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